ELIZABETH BURDEN, Plaintiff and Respondent,
v.
DAVID SNOWDEN, as Chief of Police, etc., et al., Defendants and Appellants.
No. S021885.

Supreme Court of California

Apr 30, 1992.

SUMMARY

A city police department recruit, who had been terminated by the department, sought reinstatement and other relief by way of a petition for a writ of mandate, contending that the department breached its duties owed her under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). The trial court determined that the recruit was a police officer within the meaning of the act and that the department's distinction between recruits and police officers was not valid. The court therefore granted the recruit's petition. (Superior Court of Orange County, No. 590772, William F. Rylaarsdam, Judge.) The Court of Appeal, Fourth Dist., Div. Three, No. G008981, affirmed.

The Supreme Court reversed the judgment of the Court of Appeal with directions to vacate the order of the trial court granting a writ of mandate and to remand the case to that court to determine whether the plaintiff's termination violated her due process rights, an issue which had been raised in, but had not been decided by, the trial court. It held that an examination of the legislative scheme, its history, and extrinsic aids demonstrated the act was not intended to apply to the recruit classification; therefore, the recruit was not entitled to coverage under the act. (Opinion by Baxter, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Law Enforcement Officers § 11--Public Safety Officers Procedural Bill of Rights Act--Application to Terminated Police Recruit.
In a writ proceeding initiated by a terminated city police recruit, the trial court erred in determining that the recruit was entitled to coverage under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). The recruit classification is not one which is specifically covered by the act. By its terms, the act defines public ***557** safety officers to mean only those peace officers referred to in certain enumerated sections of the Penal Code. Pen. Code, § 830.1, includes as peace officers "any police officer of a city," but contains no provision including a recruit or a civilian trainee. Prior to the enactment of the act, the Attorney General had determined that "trainee officers" were not peace officers for purposes of former Pen. Code, § 817, a predecessor to Pen. Code, § 830 et seq. (peace officers), and it may be presumed that the Legislature acquiesced in the Attorney General's distinction. Also, there was no evidence that the city police department classified certain employees as recruits for purposes of avoiding the act, or that the recruit was authorized to exercise the powers of a peace officer. Thus, real and meaningful distinctions exist between recruits and police officers. The act was intended to address the statewide concern for stable labor relations between statutorily defined public safety officers and their employers, not to regulate or restrict appointment of police officers by city police departments, and the act's purpose would not be furthered by extending coverage to persons who have not completed training.

[See **Cal.Jur.3d,** Law Enforcement Officers, § 33; 8 **Witkin,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 774.]

(2) Statutes § 20--Construction--Judicial Function--Reviewing Court.
In determining the scope of coverage under the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), the reviewing court independently determines the proper interpretation of the statute. As the matter is a question of law, the reviewing court is not bound by evidence on the question presented in the lower court or by the lower court's interpretation.

(3) Statutes § 21--Construction--Legislative Intent.
The rules governing statutory construction are well settled. The court begins with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. In determining intent, the court looks first to the

language of the statute, giving effect to its plain meaning. Although the court may properly rely on extrinsic aids, it should first turn to the words of the statute to determine the intent of the Legislature. Where the words of the statute are clear, the court may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.

(4) Statutes § 45--Construction--Presumptions--Legislature's Knowledge of Pertinent Opinions of Attorney General.
When construing a statute, a court may presume that the Legislature acts with knowledge ***558** of the opinions of the Attorney General that affect the subject matter of proposed legislation.

(5) Statutes § 20--Construction--Judicial Function--Determining What Is of Statewide Concern.
Although what constitutes a matter of statewide concern is ultimately an issue for the courts to decide, it is well settled that the courts will accord great weight to the Legislature's evaluation of this question.

(6) Appellate Review § 32--Presenting and Preserving Questions--Matter Raised for First Time on Appeal.
A ground for relief raised for the first time on appeal is not properly before the appellate court, and the appellate court need not reach the merits of the issue.

COUNSEL

Thomas Kathe, City Attorney, Filarsky & Watt, Steve A. Filarsky, Pillsbury, Madison & Sutro, Amy D. Hogue and Kevin M. Fong for Defendants and Appellants.

Mayer & Reeves, Thomas M. Reeves, Irving Berger, Martin J. Mayer, Whitmore, Johnson & Bolanos, Richard S. Whitmore, Craig W. Patenaude and Helene L. Leichter as Amici Curiae on behalf of Defendants and Appellants.

John K. York and Celinda Tabucchi for Plaintiff and Respondent.

BAXTER, J.

We granted review in this case to determine the narrow issue whether a person hired by a city police department as a "police recruit" is entitled to coverage under the Public Safety Officers Procedural Bill of Rights Act (hereafter the Bill of Rights Act or the Act) (Gov. Code, § 3300 et seq.). [FN1] Our examination of the legislative scheme, its history and extrinsic aids leads us to conclude that the Act was not intended to apply to the recruit classification; therefore, a recruit is not entitled to coverage under the Act. Accordingly, we reverse the judgment of the Court of Appeal with directions to vacate the order of the trial court granting a writ of mandate and to remand the case to that court for proceedings consistent with this opinion. ***559**

FN1 Unless otherwise indicated, all further statutory references are to the Government Code.

Facts

In February 1988, the Costa Mesa Police Department (hereafter the Department) hired Elizabeth Burden (hereafter Burden) as a police recruit. From the outset, the Department made clear it was hiring Burden as a civilian, not as a police officer. The Department's job recruitment flyer specifically provided: "The Police Recruit position is a non-sworn position performing civilian police training work while attending a P.O.S.T. [Peace Officers Standards and Training] certified basic academy. Upon successful completion of the basic academy, Police Recruits are sworn in as full-time Police Officers." [FN2] Burden also signed a "Police Officer Trainee Advisement Form" which reflected her acknowledgement that she would not represent herself as a peace officer at any time, that she would not be a peace officer until she successfully completed the police academy, and that she would take no action as a peace officer or "in any other way attempt to use Peace Officer powers." The form further provided: "Due to the untimely starting of the police academy we were not able to complete your background, therefore your background will be completed while you are attending the academy. If for some reason you fail to pass your background and or medical, you will be terminated immediately."

FN2 The Department consistently refers to the term "sworn" in describing the status of police officers and their duties, and to the term "non-sworn" in describing recruits and their duties. However, Burden points out the record contains no evidence of any oath used to specifically swear in police officers, and contends that article XX, section 3 of the California Constitution would prohibit any oath other than the oath of allegiance required for all public employees. Since the Department is not taking the position that

> Burden's failure to be sworn in specifically as a police officer, standing alone, is what precludes her from coverage under the Bill of Rights Act, we attach no significance to the Department's "sworn/non-sworn" terminology. As will be demonstrated, however, we are persuaded that material distinctions otherwise exist between police officers and recruits.

Burden was directed to report to the Orange County Sheriff's Academy for 19 weeks of training on a full-time basis. During the time she attended the academy she was paid a flat hourly rate of $10.02 by the Department. Although Burden was not issued a police identification number or badge, she was issued a uniform with a hat piece identifying her as a recruit, a gun, ammunition, a baton and handcuffs.

As part of its standard screening process, the Department conducted a background investigation of Burden. Burden signed a "Release and Waiver" which authorized the Department to obtain any information in the files of her former employers and physicians. The release and waiver additionally provided: "I further understand that I waive any right or opportunity to read or review any background investigation report prepared by the Costa Mesa ***560** Police Department." Burden also signed an "Authorization Form" directed to her previous employer, the Honolulu Police Department, authorizing the release of any and all information for the limited purpose of aiding the Department in evaluating Burden's qualifications as a police recruit. Among other things, the form contained the following statement of understanding: "I understand that I will not receive and am not entitled to know the contents of confidential reports received from these agencies and I further understand that these reports are privileged."

Following receipt of the information from the Honolulu investigation, the Department terminated Burden for "failure to meet standards of a police officer." [FN3] This occurred during her 15th week at the training academy. Burden finished the remaining four weeks of the academy at her own expense, and subsequently applied without success to four other police departments. These other departments apparently also required Burden to sign release and waiver forms as part of their background investigations.

> FN3 The record includes a "Personnel Action Form" which reflects this action, as well as Burden's personnel record which contains the entry "Failed Standards."

Through counsel, Burden eventually asked the Department for more specific information concerning the stated grounds for her termination. According to Burden's counsel, Chief of Police David Snowden informed him that Burden had committed "acts, while employed as a Honolulu Police Officer, which preclude her from ever working in law enforcement." No further information was provided.

Burden ultimately filed a claim against the City of Costa Mesa (hereafter the City). Thereafter she filed a mandamus petition in the superior court against the City, the Department and the police chief. Claiming that she was hired as a "public safety officer," Burden contended that the Department breached duties owed to her under the Bill of Rights Act (§ 3300 et seq.), and that her dismissal without notice and a pretermination hearing resulted in a deprivation of a liberty interest under the due process clause of the federal Constitution. The petition sought reinstatement, notice of the specific allegations which caused Burden's termination, an opportunity to respond, a hearing and a redetermination of the decision to terminate her.

The trial court determined that Burden was a public safety officer within the meaning of the Bill of Rights Act and that the Department's attempt to draw a distinction between police officers and recruits was not a valid one. The court further found that Burden's purported waivers of the right to see the results of her background investigation were unenforceable. Believing ***561** Burden was entitled to the Act's protections, the trial court granted her petition. [FN4]

> FN4 Because it found the Bill of Rights Act applicable to Burden, the trial court deemed it unnecessary to determine whether she was also entitled to relief as part of her liberty interest under the due process clause of the federal Constitution. The court reserved jurisdiction to later determine issues of backpay, sanctions and recovery of attorney fees.

The Court of Appeal affirmed, rejecting the Department's argument that police recruits are not public safety officers within the meaning of the Act. It also agreed that Burden's waivers were unenforceable. Finally, the court determined that because Burden's termination stigmatized her reputation and affected her ability to earn a living, it

was punitive in nature and entitled Burden to an administrative appeal under provisions of the Act.

Discussion

1. *The Bill of Rights Act.*

The Bill of Rights Act establishes certain procedural rights and protections for public safety officers. Among other things, the Act assures a public safety officer the right to an administrative appeal when any punitive action is taken against the officer. (§ 3304, subd. (b).) [FN5] The Act also affords a public safety officer the opportunity to review and sign any instrument containing any adverse comment before the instrument is entered in the officer's personnel file. (§ 3305.) [FN6] It further gives the affected officer 30 days to respond in writing to any adverse comment placed in the file. (§ 3306.) [FN7]

FN5 Section 3304, subdivision (b) provides: "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

FN6 Section 3305 provides: "No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument the public safety officer refuses to sign it. Should a public safety officer refuse to sign, that fact shall be noted on that document, and signed or initialed by such officer."

FN7 Section 3306 provides: "A public safety officer shall have 30 days within which to file a written response to any adverse comment entered in his personnel file. Such written response shall be attached to, and shall accompany, the adverse comment."

(1a) The central issue is whether Burden is a "public safety officer" within the meaning of the Bill of Rights Act. The Department contends that because it hired Burden as a "police recruit" (referring to a candidate for a ***562** police officer position who has not yet completed a training academy and who is not authorized to use peace officer powers), and not as a "police officer," she is not a public safety officer as defined by the Act. Burden, on the other hand, contends that police recruits are encompassed by the Act's definition of "public safety officer," and that local agencies may not defeat application of the Act by classifying new hires as "recruits" instead of "police officers." Both the trial court and the Court of Appeal below held that the Act was intended to cover police recruits. For the reasons set forth below, we conclude otherwise.

(2) In determining the scope of coverage under the Act, we independently determine the proper interpretation of the statute. As the matter is a question of law, we are not bound by evidence on the question presented below or by the lower court's interpretation. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699 [170 Cal.Rptr. 817, 621 P.2d 856]; *Los Angeles County Safety Police Assn. v. County of Los Angeles* (1987) 192 Cal.App.3d 1378, 1384 [237 Cal.Rptr. 920].)

(3) The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 208 [271 Cal.Rptr. 191, 793 P.2d 524]; *California Teachers Assn. v. San Diego Community College Dist., supra,* 28 Cal.3d at p. 698.) "In determining intent, we look first to the language of the statute, giving effect to its 'plain meaning.' " (*Kimmel, supra,* 51 Cal.3d at pp. 208-209, citing *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 218-219 [188 Cal.Rptr. 115, 655 P.2d 317]; *California Teachers Assn., supra,* 28 Cal.3d at p. 698.) Although we may properly rely on extrinsic aids, we should first turn to the words of the statute to determine the intent of the Legislature. (*California Teachers Assn., supra,* 28 Cal.3d at p. 698.) Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. (*Ibid.*)

(1b) During all relevant times herein, the Bill of Rights Act provided: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31 except subdivision (f), 830.4 except subdivision (f), and 830.5 of the Penal Code." (§ 3301.) [FN8] Penal Code section 830.1 is the only enumerated section of relevance to this ***563** case. When Burden was terminated in June 1988, Penal Code section 830.1 specified that "any police officer of a city" is a peace

officer. [FN9]

FN8 In 1989 and 1990, section 3301 was amended to specify additional Penal Code sections within its ambit. (Stats. 1989, ch. 1165, § 5; Stats. 1990, ch. 675, § 1.)

FN9 All of the Penal Code sections specified in section 3301 are contained in chapter 4.5 of part 2, title 3 of the Penal Code which defines "peace officers." In June 1988, Penal Code section 830 provided: "Any person who comes within the provisions of [chapter 4.5] and who otherwise meets all standards imposed by law on a peace officer is a peace officer, and notwithstanding any other provision of law, *no person other than those designated in this chapter is a peace officer.* The restriction of peace officer functions of any public officer or employee shall not affect his status for purposes of retirement." (Italics added.)
In 1988, Penal Code section 830.1, subdivision (a) designated the following classifications: "Any sheriff, undersheriff, or deputy sheriff, regularly employed and paid as such, of a county, *any police officer of a city,* any police officer of a district (including police officers of the San Diego Unified Port District Harbor Police) authorized by statute to maintain a police department, any marshal or deputy marshal of a municipal court, any constable or deputy constable, regularly employed and paid as such, of a judicial district, or any inspector or investigator regularly employed and paid as such in the office of a district attorney, *is a peace officer.* ..." (Italics added.)
In 1990, an amendment to Penal Code section 830.1, subdivision (a) revised, inter alia, the designation of "any police officer of a city" to "any police officer, employed in that capacity and appointed by the chief of police or the chief executive of the agency, of a city." (Stats. 1990, ch. 1695, § 9.) The Department invites us to apply this amendment on the basis that *Hays v. Wood* (1979) 25 Cal.3d 772, 782 [160 Cal.Rptr. 102, 603 P.2d 19], compels application of current law because Burden is purporting to seek "relief in futuro." Alternatively, it urges the amendment merely clarifies existing law. However, even if we were to assume that the new language is dispositive of the issues here, *Hays* is inapplicable because Burden is not seeking injunctive relief directed to future acts. Moreover, the Legislature did not declare the amendment to apply retroactively, nor do the legislative materials provided by the Department support retroactive application of the amended language quoted above. (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287 [279 Cal.Rptr. 592, 807 P.2d 434].) Rather, the materials concern another part of the 1990 amendment which purported to clarify existing law as it pertained to *reserve* officers.

Applying the foregoing rules of statutory construction, we observe that the recruit classification is not one which is specifically covered by the Act. The Act, by its own terms, defines public safety officers to mean only those peace officers referred to in certain enumerated sections of the Penal Code. Notably, the only Penal Code section relevant here provides that a peace officer includes "any police officer of a city," but contains no provision for the conferring of peace officer status upon a person appointed as a "police recruit" or "civilian trainee." (Pen. Code, § 830.1.)

Although Penal Code section 830.1 does not specify the recruit classification as a separate category of "peace officer," neither does it expressly exclude recruits. For this reason, Burden essentially takes the position that the term "any police officer of a city" is ambiguous and should be interpreted with reference to what she contends was the common meaning of the term "police officer" at the time the Bill of Rights Act was passed. Burden relies on the declarations of two 22-year veteran police officers, which set ***564** forth their current recollections that in 1976, police departments throughout California commonly used the term "police officer" to refer to police recruits and trainees as well as sworn police officers. [FN10] According to these officers, such practice continued at least until 1982, at which time new policies were instituted whereby new personnel were assigned the classification of "police recruit," and then elevated to "police officer" upon completion of the training academy.

FN10 In the trial court, Burden submitted the declarations of Sergeant Jack Jansen of the Anaheim Police Department and Lieutenant Leo Tamisiea of the Office of the Chief of the Bay Area Rapid Transit District

Police Department. Sergeant Jansen declared that in 1976, all new law enforcement personnel hired by the Anaheim Police Department were assigned the job title of "police officer" from the first day of employment; there was no special classification of "police officer recruit" for those personnel who had not completed the training academy. Sergeant Jansen stated that the department's policy changed in 1982, at which time new personnel were assigned the classification of "police recruit," and were then elevated to "police officer" upon completion of the training academy. Lieutenant Tamisiea, drawing from his experience as Chairman of the Peace Officers' Research Association of California, declared that the same was essentially true for "nearly all (if not all) law enforcement agencies in California."

This argument is unpersuasive. The declarations of these two officers are not logically probative of the Legislature's intent in enacting the Bill of Rights Act. Indeed, a 1968 opinion of the California Attorney General gives rise to a presumption that the Legislature did not intend the Act to cover the recruit classification.

(4) When construing a statute, we may presume that the Legislature acts with knowledge of the opinions of the Attorney General which affect the subject matter of proposed legislation. (*Cal. State Employees Assn. v. Trustees of Cal. State Colleges* (1965) 237 Cal.App.2d 530, 536 [47 Cal.Rptr. 73].) (1c) Here it is significant that, before the Bill of Rights Act was enacted, a published opinion of the California Attorney General had concluded that "cadets" and "trainee officers" were not peace officers under former Penal Code section 817, the predecessor statute to Penal Code section 830 et seq. [FN11] The Attorney General wrote: "There is no provision in [Penal Code] section 817 for the conferring of peace officer status upon a person appointed as a 'cadet' or 'trainee officer.' Since the [L]egislature has expressly named those who are 'peace officers' and has failed to include the aforementioned classifications, and additionally, since the designation 'cadet' or 'trainee ***565** officer' cannot be construed as being within the classification ' reserve' or 'auxiliary' sheriffs, we conclude that these persons are not peace officers within section 817." (51 Ops.Cal.Atty.Gen. 110, 112 (1968).)

FN11 Penal Code, former section 817 provided in pertinent part: "A peace officer is the sheriff, undersheriff, deputy sheriff, coroner, deputy coroner, regularly employed and paid as such of a county, any qualified person, when deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city policeman while performing police functions assigned to him by the appointing authority, ... marshal, policeman of a city or town ...." (Stats. 1967, ch. 604, § 1, p. 1952.) In 1968, Penal Code section 817 was repealed (Stats. 1968, ch. 1222, § 58, p. 2322) and was replaced by Penal Code section 830 et seq. (Stats. 1968, ch. 1222, § 1, p. 2303).

Since the designation of peace officers in former Penal Code section 817 is not materially different from the designation in Penal Code section 830.1, subdivision (a) for purposes of making the cadet/trainee distinction, [FN12] the Legislature presumably acquiesced to the distinction when it subsequently enacted the Bill of Rights Act. (See *Tiffany v. Sierra Sands Unified School Dist.* (1980) 103 Cal.App.3d 218, 227 [162 Cal.Rptr. 669].)

FN12 The Court of Appeal concluded below that the Attorney General's 1968 opinion was inapplicable. It reasoned that, unlike police recruits such as Burden, the employees covered by that opinion were not "regularly employed and paid as such." We are not persuaded. The Attorney General did not determine that cadets and trainees were not peace officers because they were not regularly employed and paid. Rather, the Attorney General concluded quite specifically that cadets and trainee officers did not have peace officer status because there was no express provision in former Penal Code section 817 for such classifications. (See 51 Ops.Cal.Atty.Gen., *supra,* at pp. 110, 112.)

Burden attempts to bolster her position by emphasizing that the Act encompasses a matter of statewide concern. She argues that the Department is improperly attempting to opt out of the legislation by simply "relabelling" a job title. This argument is without merit for two reasons.

To begin with, there is no evidence that the Department simply "relabels" job titles as among recruits and police officers for the purpose of avoiding the Act. Those appointed to the position of

police officer are authorized to use the powers of a peace officer and to engage in active law enforcement. On the other hand, those appointed to the recruit position do not exercise such powers or functions; they are committed to attend the training academy on a full-time basis. There is no suggestion that the Department classifies any employee exercising peace officer authority as a recruit. [FN13] On this record, then, there exist real and meaningful distinctions between those classified as recruits and those classified as police officers. [FN14]

> FN13 Evidence in the record also indicates that recruits are treated in a category separate from police officers with regard to wages. Additionally, the Costa Mesa Police Association, by agreement with the City, represents various police officer classifications, but does not represent the recruit classification.
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> FN14 Indeed, Burden is not claiming the Department hired her as a de facto police officer. She does not contend she was authorized to exercise peace officer powers or otherwise act as a police officer. In fact she signed a "Police Officer Trainee Advisement Form" specifically acknowledging that she would not. Aside from her written acknowledgments, Burden was not issued a police identification number or badge. The hat piece she was issued specifically identified her as a recruit.

More significantly, the Department's appointment of police recruits and police officers is not a matter of statewide concern which is addressed by the Bill of Rights Act. ***566**

(5) "Although what constitutes a matter of statewide concern is ultimately an issue for the courts to decide, it is well settled that this court will accord 'great weight' to the Legislature's evaluation of this question. [Citation.]" (*Baggett v. Gates* (1982) 32 Cal.3d 128, 136 [185 Cal.Rptr. 232, 649 P.2d 874], fn. omitted [hereafter *Baggett*].) (1d) The Legislature's evaluation in this instance is quite explicit: "The Legislature hereby finds and declares that the rights and protections provided to peace officers [by the Bill of Rights Act] constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer- employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California." (§ 3301.) Thus, the plain purpose of the Act is to assure the provision of effective law enforcement services throughout the state by maintaining stable employment relations between certain statutorily defined public safety officers and their employers.

In contrast, we have already recognized that the Bill of Rights Act is not intended to regulate or restrict the appointment of police officers by local law enforcement agencies. In *Baggett, supra,* we held that the home rule provisions of the California Constitution (Cal. Const., art. XI, § 5) do not preclude application of the Act to charter cities. In reaching that conclusion, we explained that the Act does not "purport to regulate [peace officers'] qualifications for employment," or " 'the manner in which,' or 'the method by which,' or 'the times at which,' " peace officers are elected or appointed. (*Baggett, supra,* 32 Cal.3d at p. 138.) Thus, the Act in no way impinges on the Department's ability to hire civilian recruits and to screen and train them before deeming them qualified to assume the position of "police officer." [FN15]

> FN15 State regulations require that every peace officer employed by a city police department or county sheriff's department shall serve in a probationary status for at least 12 months. (Cal. Code Regs., tit. 11, § 1004.) We note there are cases assuming or recognizing that a public safety officer includes a person who is appointed to a police officer or sheriff position, even though the person is in a probationary status. (E.g., *Gray v. City of Gustine* (1990) 224 Cal.App.3d 621 [273 Cal.Rptr. 730] [probationary police chief]; *Hanna v. City of Los Angeles* (1989) 212 Cal.App.3d 363 [260 Cal.Rptr. 782] [probationary police officer]; *Browning v. Block* (1985) 175 Cal.App.3d 423 [220 Cal.Rptr. 763] [probationary deputy sheriff]; *Swift v. County of Placer* (1984) 153 Cal.App.3d 209 [200 Cal.Rptr. 181] [probationary deputy sheriff]; *Barnes v. Personnel Department* (1978) 87 Cal.App.3d 502 [151 Cal.Rptr. 94] [probationary police officer].) These cases are inapposite since Burden was not hired as a police officer to begin with.

Burden next argues that if the legislative goal of eliminating labor unrest is to be achieved, the Bill of Rights Act would "logically cover" civilian ***567** trainees as well as postacademy graduates. However, there is no indication the Legislature sought to eliminate labor unrest among all categories of employees hired by law enforcement agencies. On the contrary, section 3301 makes clear that the Legislature was specifically concerned with the assurance of effective law enforcement, and went only so far as to provide procedural protections for certain statutorily designated peace officers.

In this regard, we observed in *Baggett, supra,* that "it can hardly be disputed that the maintenance of stable employment relations between police officers and their employers is a matter of statewide concern. The consequences of a breakdown in such relations are not confined to a city's borders. These employees provide an essential service. Its absence would create a clear and present threat not only to the health, safety and welfare of the citizens of the city, but also to the hundreds, if not thousands, of nonresidents who daily visit there. Its effect would also be felt by the many nonresident owners of property and businesses located within the city's borders. ... The inevitable result is that labor unrest and strikes produce consequences which extend far beyond local boundaries." (32 Cal.3d at pp. 139-140.) [FN16]

> FN16 The Legislature explicitly stated its concern over such matters when it amended section 3301 in 1983. The legislation was described as "an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect." (Stats. 1983, ch. 964, § 3, p. 3464.)

While labor unrest and work stoppage among police officers pose an obvious threat to the health, safety and welfare of the citizenry, it is doubtful that the same can be said in the case of police recruits. Police recruits such as Burden are not permitted to exercise peace officer authority or to otherwise act as police officers; instead, they attend a training academy on a full-time basis. And while it may be said that police recruits provide a pool from which police officers are ultimately selected, recruits are not immediately responsible for the public welfare. We therefore reject the notion that the Act must "logically cover" recruits and trainees in order to achieve the Act's goals.

Indeed, to judicially deem police recruits to be the equivalent of police officers, thus entitling them to the full panoply of protections under the Act, may even detract from effective law enforcement. Appointing new hires to the position of recruit offers local law enforcement agencies their first opportunity to quickly screen out those candidates who are unfit or unable to function as officers. It behooves cities, police departments, police officers, and most important, the public, to weed out these candidates at the earliest opportunity. Construing the term "police officer" to include recruits unnecessarily restricts local agencies from eliminating those candidates whose ***568** background investigations and/or academy performance indicate their likely unsuitability as police officers. [FN17]

> FN17 Indeed, governmental entities may be held vicariously liable for certain misconduct committed by police officers acting within the course and scope of employment. (E.g., *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202 [285 Cal.Rptr. 99, 814 P.2d 1341] [rape arising from misuse of official authority]; *Larson v. City of Oakland* (1971) 17 Cal.App.3d 91 [94 Cal.Rptr. 466] [assault and battery]; *Scruggs v. Haynes* (1967) 252 Cal.App.2d 256 [60 Cal.Rptr. 355] [assault and battery, use of unreasonable force].) Consequently, it is important for cities to be able to swiftly eliminate those candidates most likely to commit misconduct or exercise bad judgment.

Burden raises two other arguments in support of her expansive interpretation of the Bill of Rights Act. First, she argues that the contents of related statutes show the Legislature's contemplation that recruits who have not completed the training academy are included in the definition of "peace officer." Second, she contends her position is supported by a 1980 opinion of the Attorney General. As demonstrated below, neither argument has merit.

First, Burden reasons that if the term "peace officer" is intended to refer only to graduates of the training academy, the effect of Penal Code section 832 [FN18] would be to require "peace officers" who have already completed the training academy to complete the training academy. Burden argues such an interpretation would render Penal Code section 832 redundant and meaningless. We disagree.

FN18 At the time Burden was hired, Penal Code section 832, subdivision (b) provided in pertinent part: "Every such peace officer described in this chapter, within 90 days following the date that he or she was first employed by any employing agency, shall, prior to the exercise of the powers of a peace officer, have satisfactorily completed [an introductory course of training prescribed by the Commission on Peace Officer Standards and Training]." (Stats. 1987, ch. 157, § 1, p. 1091.) In 1991, section 832 was amended to delete the requirement that the course be completed within 90 days of first employment and to add provisions relating to persons who do not become employed within three years from the date of passing the examination and persons who have had a three-year break in peace officer service. (Stats. 1991, ch. 509, § 2.)

In enacting Penal Code section 832, the Legislature expressly stated its intent to set forth minimum standards designed to "raise the level of competence of peace officers where necessary." (Stats. 1971, ch. 1504, § 3, p. 2975.) [FN19] We do not view the minimum standards contained in section 832 as suggesting any legislative intent to affirmatively confer peace officer status ***569** upon those appointed to trainee positions. We likewise perceive no intent to preclude police departments from requiring an officer candidate to successfully complete academy training before being eligible for the position of police officer. [FN20]

FN19 Section 1 of the Statutes of 1971, chapter 1504, pages 2974-2975, amended Government Code section 1031 which sets forth six minimum standards for peace officers. Section 2 thereof added section 832 to the Penal Code. Uncodified section 3 thereof provided: "It is the intent of the Legislature in enacting this act that the minimum standards described in Section 2 of this act shall be designed to raise the level of competence of peace officers where necessary and are not intended to supersede state or local law enforcement policy regarding the use of firearms or the exercise of powers to arrest."

FN20 If anything, the scheme appears to contemplate that, to the extent a police department undertakes to appoint a trainee as a police officer, the trainee shall not exercise peace officer powers until he or she meets the minimum training requirements contained in Penal Code section 832.

Next, Burden argues her position is supported by an opinion of the Attorney General concerning the applicability of the Bill of Rights Act to sheriffs and police chiefs. (63 Ops.Cal.Atty.Gen. 829 (1980).) In concluding that sheriffs and police chiefs are covered by the Act, the Attorney General also determined that the Act applies to these and other peace officers even when the officers are unable to exercise peace officer authority for failure to meet the training or certificate requirements prescribed in Penal Code sections 832, 832.3, and 832.4. The Attorney General found that the training requirements are not a condition of employment, but a condition of the exercise of peace officer authority. He therefore concluded that "failure to meet those requirements or receive such a certificate by such a person may create an employer-employee relation of the type contemplated by the Legislature in enacting the act." (63 Ops.Cal.Atty.Gen., *supra,* at pp. 833-834.)

The Attorney General's opinion does not assist a person in Burden's position since it specifically refers to application of the Act to "a person employed in the position of a peace officer described in Penal Code section 830.1" and to any other peace officer "who would otherwise be included" in the Act. (63 Ops.Cal.Atty.Gen., *supra,* at p. 833.) We do not read the opinion as broadly calling for application of the Act to trainees who have not yet attained the position of police officer. [FN21] To do so would run contrary to our pronouncement in *Baggett, supra,* that the Act does not purport to regulate peace officers' qualifications for employment, or the manner in which, or the method by which, or the times at which, peace officers are elected or appointed. (*Baggett, supra,* 32 Cal.3d at p. 138.)

FN21 We also note the 1980 opinion does not acknowledge or distinguish the Attorney General's earlier position that cadets and trainee officers were not peace officers under former Penal Code section 817 (the predecessor statute to section 830 et seq.). (See 51 Ops.Cal.Atty.Gen., *supra,* at p. 110.)

In sum, while the Bill of Rights Act is intended to provide procedural protections to police officers, it is not intended to regulate or restrict the appointment of police officers by city police departments. Consequently, a person hired by a police department

as a recruit and not as a police officer is ***570** not entitled to coverage under the Act where real and meaningful distinctions exist between those classifications. We therefore hold that Burden is not covered by the Act. Because we find the Act inapplicable, we need not and do not decide the other issues raised by the parties regarding interpretation of the Act's provisions, and Burden's purported waivers thereof.

II. *Other Issues.*

Burden argues in her answer brief to the Department's brief on the merits that she is entitled to review her personnel file pursuant to the Public Records Act (§ 6250 et seq.), the Information Practices Act of 1977 (Civ. Code, § 1798 et seq.) and Labor Code section 1198.5. (6) However, this is the first time in this lawsuit that she has asserted these statutes as grounds for relief. Since these issues are not properly before us, we do not reach them on the merits.

Additionally, in the proceedings before the trial court, Burden sought relief on the alternative basis that because her termination stigmatized her reputation and impaired her ability to earn a living in her chosen profession, she was entitled to notice and a name-clearing hearing as part of her liberty interest under the due process clause of the federal Constitution. Since the trial court found the Bill of Rights Act applicable to Burden, it deemed it unnecessary to determine whether she additionally had rights as part of her liberty interest. In affirming the trial court judgment, the Court of Appeal also failed to consider this matter.

As the issue of relief under the due process clause of the federal Constitution was not previously addressed by the courts below, we decline to consider it for the first time here. But because the issue has not yet been resolved in the trial court, the matter is remanded to allow that court to decide whether Burden is entitled to a writ of mandate on that ground.

Disposition

The judgment of the Court of Appeal is reversed with directions to vacate the order of the trial court granting a writ of mandate and to remand the case to that court for proceedings consistent with this opinion.

Lucas, C. J., Mosk, J., Panelli, J., Kennard, J., Arabian, J., and George, J., concurred.

On May 28, 1992, the opinion was modified to read as printed above. ***571**

Cal. 1992.

Burden v. Snowden

END OF DOCUMENT

C

CALIFORNIA STATE RESTAURANT ASSOCIATION, Plaintiff and Respondent,
v.
EVELYN E. WHITLOW, as Chief, etc., Defendant and Appellant
Civ. No. 38010.

Court of Appeal, First District, Division 4, California.

May 17, 1976.

SUMMARY

The trial court ordered issuance of a writ of mandate restraining the Chief of the Division of Industrial Welfare, State Department of Industrial Relations, from enforcing a policy of prohibiting an employer from taking a credit against the minimum wage of a restaurant employee for the dollar value of meals furnished, without the specific written consent of the employee. The court held that a minimum wage order promulgated by the Industrial Welfare Commission, then in effect, authorized employers in the restaurant industry to take a credit for meals furnished or reasonably made available to employees without such consent, that the announced policy would constitute an amendment to the order, and that it was therefore beyond the scope of defendant's authority. (Superior Court of the City and County of San Francisco, No. 680041, Ira A. Brown, Jr., Judge.)

The Court of Appeal reversed with directions to the trial court to deny the writ. While the court agreed with the trial court that the wage order permitted an employer to take credit for meals against the minimum wage without the employee's consent, it further held that the order was void as in conflict with the provision of Lab. Code § 450, that no employer shall compel or coerce any employee to patronize his employer, or any other person, in the purchase of anything of value. The court held there was no perceptible practical difference between an "in kind" payment of wages and a "compelled purchase." (Opinion by Caldecott, P. J., with Rattigan and Christian, JJ., concurring.) *341

HEADNOTES

Classified to California Digest of Official Reports

(1) Administrative Law § 35--Administrative Actions--Construction and Interpretation of Rules and Regulations.
Generally, the same rules of construction and interpretation which apply to statutes govern the interpretation of rules and regulations of administrative agencies.

(2) Administrative Law § 35--Administrative Actions--Construction and Interpretation of Rules and Regulations.
In construing a statute or an administrative regulation, a court should ascertain the intent of the promulgating body so as to effectuate the intended purpose of the statute or regulation.

(3a, 3b) Labor § 10--Minimum Wage Orders.
A provision of a minimum wage order promulgated by the Industrial Welfare Commission permitting restaurant employers to take a credit for the value of meals furnished employees against the minimum wage otherwise payable, was correctly construed by the trial court as allowing the employer to take the credit without the consent of the employee, where every wage order relating to the restaurant industry during a period of over 20 years had referred to meals furnished by the employer as a part of the minimum wage, and no policy statements during that period made any reference to any requirement of employee consent, where during that period, and for many years prior thereto, it had been the open and recognized practice of restaurant employers to take a meal credit against the minimum wage without employee consent, and where the commission had considered and rejected a proposal that the wage order in question expressly require employee consent.

(4) Statutes § 44--Contemporaneous Administrative Construction.
Contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized.

(5) Statutes § 44--Contemporaneous Administrative Construction--Reenactment of Statute With Established Administrative Construction.
Reenactment of a provision which has a meaning *342 well-established by administrative construction is persuasive evidence that the intent of the enacting authority was to continue the same construction

previously applied.

(6a, 6b) Labor § 10--Minimum Wage Orders--In Kind Payment of Wages as Compelled Purchase.
A provision of a minimum wage order promulgated by the Industrial Welfare Commission permitting restaurant employers to take a credit for the value of meals furnished employees against the minimum wage otherwise payable, construed as permitting the employer to take the credit without the consent of the employee, violates Lab. Code, § 450, which prohibits compelling or coercing an employee "to patronize his employer, or any other person, in the purchase of anything of value." There is no perceptible practical difference between an "in kind" payment of wages and a "compelled purchase," and any implied power the commission might have under Lab. Code, § § 1182, 1184, to authorize in kind payments must be limited, in harmony with § 450, to situations in which such manner of payment is authorized by specific and prior voluntary employee consent.

[See **Cal.Jur.2d,** Labor, § 24; **Am.Jur.2d,** Labor and Labor Relations, § 1789.]

(7) Administrative Law § 30--Administrative Actions--Effect and Validity of Rules and Regulations--Necessity for Compliance With Enabling Statute.
Administrative bodies and officers have only such powers as have expressly or impliedly been conferred on them by the Constitution or by statute. In the absence of valid statutory or constitutional authority, an administrative agency may not, under the guise of regulation, substitute its judgment for that of the Legislature, and administrative regulations in conflict with applicable statutes are null and void.

(8) Statutes § 28--Construction--Ordinary Language.
In order that legislative intent be given effect, a statute should be construed with due regard for the ordinary meaning of the language used and in harmony with the whole system of law of which it is a part.

(9) Statutes § 27--Construction--Liberality--Remedial Statutes.
A remedial statute must be liberally construed so as to effectuate its object and purpose, and to suppress the mischief at which it is directed. ***343**

COUNSEL

Evelle J. Younger, Attorney General, and Gordon Zane, Deputy Attorney General, for Defendant and Appellant.

Hawkins, Cooper, Pecherer & Ludvigson, Daryl R. Hawkins, M. Armon Cooper and Nathan Lane III for Plaintiff and Respondent.

CALDECOTT, P. J.

The issue presented on this appeal is whether Labor Code section 450 prohibits an employer in the restaurant industry from requiring a minimum wage employee to take meals as part of his compensation and have the value of the meals deducted from the minimum wage without the written consent of the employee. We conclude that such action is prohibited.

On August 26, 1974, appellant Evelyn Whitlow, [FN1] as Chief of the Division of Industrial Welfare, Department of Industrial Relations for the State of California, announced her intention to institute a "new policy" regarding certain provisions of the then current minimum wage order of the Industrial Welfare Commission.

> FN1 The writ of mandate issued by the trial court was directed to Whitlow, who is hereinafter described as "appellant" although the agency itself is also a named party and appellant.

Section 4 of Minimum Wage Order No. 1-74 allowed employers in the restaurant industry to take a credit for the value of meals furnished employees against the minimum wage otherwise payable. The "new policy" set forth in a document entitled "Meal Policy for Restaurants Only," inter alia, prohibited a credit against the minimum wage for the dollar value of meals furnished without the *specific written consent of the employee.* It further provided that such consent could be revoked at the beginning of each month. This new policy was based on appellant's determination that the current construction of section 4 of Order No. 1-74 was in violation of section 450 of the Labor Code.

Respondent California State Restaurant Association filed a petition for a writ of mandate to in effect restrain the appellant from putting the "new policy" into operation. The trial court entered judgment granting a ***344** peremptory writ of mandate in favor of respondent. The appeal [FN2] is from the judgment.

FN2 Appellant in her brief has limited her appeal to that portion of the judgment enjoining enforcement of appellant's "New Policy" of requiring prior revocable employee consent to meal credit deductions from the cash minimum wage.

I

The court below concluded that section 4 of Minimum Wage Order No. 1-74 "authorizes employers in the restaurant industry to take a credit ... for meals furnished or reasonably made available to employees without the specific written consent of such employees to have the value of such specific meals credited by employers against the minimum wage otherwise due the employees ...." Because the appellant's "new policy" would thus constitute an amendment to the order, the court held that it was beyond the scope of her authority, as only the Industrial Welfare Commission has the power to adopt or change a minimum wage order. (Lab. Code, § 1182.)

Appellant contends that the wage order is silent on the issue of consent to meal credit deductions, and that there has been no administrative interpretation of the regulation to the effect that such deductions are authorized in the absence of employee consent. Thus, appellant argues, the policy statement was within the authority of the Division of Industrial Welfare to take all proceedings necessary to enforce minimum wage regulations in accordance with the law, specifically, the prohibitions of Labor Code section 450. (Lab. Code, § § 59, 61, 1195.)

(1) Generally, the same rules of construction and interpretation which apply to statutes govern the interpretation of rules and regulations of administrative agencies. (*Cal. Drive-In Restaurant Assn.* v. *Clark*, 22 Cal.2d 287, 292 [140 P.2d 657, 147 A.L.R. 1028]; *Intoximeters, Inc. v. Younger*, 53 Cal.App.3d 262, 270 [125 Cal.Rptr. 864].) The Industrial Welfare Commission acts as a quasi-legislative body in promulgating minimum wage orders. (*Rivera v. Division of Industrial Welfare*, 265 Cal.App.2d 576, 586 [71 Cal.Rptr. 739].) (2) Of course, the cardinal rule of construction is that the court should ascertain the intent of the promulgating body so as to effectuate the intended purpose of the statute or regulation. (*East Bay Garbage Co. v. Washington Township Sanitation Co.*, 52 Cal.2d 708, 713 [344 P.2d 289]; *California Sch. Employees Assn. v. Jefferson Elementary Sch. Dist.*, 45 Cal.App.3d 683, 691 [119 Cal.Rptr. 668]; Code Civ. Proc., § 1859.) This rule has been extended to ***345** construction of administrative regulations. (*Cal. Drive-In Restaurant Assn. v. Clark, supra.*)

(3a) Thus, the commission's intent is the most significant factor in interpretation of its wage order. In reaching the conclusion that meal credit deductions without employee consent are authorized by section 4 of order No. 1-74, the trial court properly relied on two additional principles of construction. (4) First, "contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized." (*Rivera v. City of Fresno*, 6 Cal.3d 132, 140 [98 Cal.Rptr. 281, 490 P.2d 793].) (5) Second, reenactment of a provision which has a meaning well-established by administrative construction is persuasive evidence that the intent of the enacting authority was to continue the same construction previously applied. (*Cooper v. Swoap*, 11 Cal.3d 856, 868 [115 Cal.Rptr. 1, 524 P.2d 97]; *Cal. M. Express. v. St. Bd. of Equalization*, 133 Cal.App.2d 237, 239-240 [283 P.2d 1063].)

(3b) Appellant urges that there was no administrative construction of the prior wage orders, but only an interpretation by the restaurant industry. The record belies this assertion. Since 1952, every minimum wage order relating to the restaurant industry has specified that "when meals are furnished by the employer *as a part of the minimum wage*, they may not be evaluated in excess of the following [cash equivalents] ...." (Italics added.) Since at least 1944, it has been the open and recognized practice of the restaurant industry for employers to take a meal credit against the minimum wage without employee consent. Division of Industrial Welfare "Policy" statements prior to the appellant's 1974 notice make no reference to any requirement of employee consent. Moreover, the commission considered a proposal that wage order No. 1-74 expressly requires employee consent to such meal credits, but this was written out of the final version of the order. Just as "[t]he sweep of the statute should not be enlarged by insertion of language which the Legislature has overtly left out" (*People v. Brannon*, 32 Cal.App.3d 971, 977 [108 Cal.Rptr. 620]), so the wage order should not be interpreted as including a limitation declined by the commission. In the face of a well-known and documented interpretation and application of the regulation over many years, the commission ratified that construction by reenacting the regulation in substantially the same form, without substantive

change. *346

This interpretation was thus properly accepted by the trial court as authoritatively intended by the commission in wage order No. 1-74. However, this is not dispositive of the matter, for it is clear that the administrative regulation, as interpreted, must not conflict with applicable state laws; to the extent that it does so conflict, the regulation is void.

II

(6a) Appellant contends that the meal credit provision of order No. I- 74, as construed, violates Labor Code section 450, which provides: "No employer, or agent or officer thereof, or other person, shall compel or coerce any employee, or applicant for employment, to patronize his employer, or any other person, in the purchase of any thing of value."

Respondent argues that the meal credit provision does not permit an employer to "compel or coerce" an employee to "purchase" a meal within the meaning of section 450, but rather merely authorizes the employer to reduce his *cash* minimum wage obligation by part payment "in kind." Thus, respondent contends, the meal credit against the minimum wage otherwise payable is not a "purchase" within section 450, but is instead a partial fulfillment of the employer's minimum wage obligation; where a meal is provided an employee is not entitled to the higher cash minimum wage. Respondent urges that under Labor Code sections 1182 and 1184, [FN3] the Industrial Welfare Commission has an implied power to authorize in kind payment of wages without employee consent to such manner of payment, and the wage order as construed is a valid exercise of such authority.

> FN3 Section 1182 provides in pertinent part: "After the wage board conference and public hearing, as provided in this chapter, the commission may, upon its own motion or upon petition, fix:
> "(a) A minimum wage to be paid to employees engaged in any occupation, trade, or industry in this state, which shall not be less than a wage adequate to supply the necessary costs of proper living to, and maintain the health and welfare of such employees."
> Section 1184 provides: "After an order has been promulgated by the commission making wages ... mandatory in any occupation, trade, or industry, the commission may at any time upon its own motion, or upon petition of employers or employees reconsider such order for the purpose of altering, amending, or rescinding such order or any portion thereof. For this purpose the commission shall proceed in the same manner as prescribed for an original order. Such altered or amended order shall have the same effect as the original order."

(7) Administrative bodies and officers have only such powers as have expressly or impliedly been conferred upon them by the Constitution or *347 by statute. (*Ferdig v. State Personnel Bd.*, 71 Cal.2d 96, 103 [77 Cal.Rptr. 224, 453 P.2d 728].) In the absence of valid statutory or constitutional authority, an administrative agency may not, under the guise of regulation, substitute its judgment for that of the Legislature. Administrative regulations in conflict with applicable statutes are null and void. (*Harris v. Alcoholic Bev. Etc. Appeals Bd.*, 228 Cal.App.2d 1, 6 [39 Cal.Rptr. 192]; *Hodge v. McCall*, 185 Cal. 330, 334 [197 P. 86].)

Certain additional principles of construction are helpful to resolution of this controversy. (8) In order that legislative intent be given effect, a statute should be construed with due regard for the ordinary meaning of the language used and in harmony with the whole system of law of which it is a part. (*Anaheim Union Water Co. v. Franchise Tax Bd.*, 26 Cal.App.3d 95, 106 [102 Cal.Rptr. 692].) (9) A remedial statute must be liberally construed so as to effectuate its object and purpose, and to suppress the mischief at which it is directed. (*City of San Jose v. Forsythe*, 261 Cal.App.2d 114, 117 [67 Cal.Rptr. 754]; *Lande v. Jurisich*, 59 Cal.App.2d 613, 616-617 [139 P.2d 657].)

(6b) Section 450 manifests a legislative intent to protect wage earners against employer coercion to purchase products or services from the employer. In the context of the present case, that section is plainly part of "the established policy of our Legislature of protecting and promoting the right of a wage earner to all wages lawfully accrued to him." (*City of Ukiah v. Fones*, 64 Cal.2d 104, 108 [48 Cal.Rptr. 865, 410 P.2d 369].) The Legislature evidently determined "that the evil thus to be guarded against was sufficiently prevalent to require legislative action, and the remedy ought not to be defeated by judicial construction if that result can reasonably be avoided." (*Lande v. Jurisich, supra*, 59 Cal.App.2d at p. 617.)

While it may be argued that "in kind" payment of wages is not technically or narrowly speaking a

"compelled purchase," there is no perceptible practical difference between the two. Where an employee is not allowed the choice between cash and in kind payment, but rather is forced to accept goods or services from his employer in lieu of cash as part of the minimum wage, the same mathematical result obtains as if the employer had paid the wages in cash with the condition that the employee spend with the employer an amount equal to the allowable credit (here, on a meal) at the end of each shift. This latter practice unquestionably violates section 450. Employers cannot be permitted to evade the salutary objectives of the statute by indirection. ***348**

Moreover, sections 1182 and 1184, urged by respondent in support of its contentions, are similarly subject to the rule of liberal construction of remedial legislation. (*California Grape etc. League* v. *Industrial Welfare Com.*, 268 Cal.App.2d 692, 698 [74 Cal.Rptr. 313].) Additionally, the statutes must be construed in harmony with section 450, so as to carry out the fundamental legislative purposes of the whole act. (*Earl Ranch, Ltd. v. Industrial Acc. Com.*, 4 Cal.2d 767, 769 [53 P.2d 154]; *Moyer v. Workmen's Comp. Appeals Bd.*, 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].) In light of the prohibition against compelled purchases in section 450, the implied power of the commission to authorize in kind payments must be limited to situations in which such manner of payment is authorized by specific and prior voluntary employee consent. This limitation is consistent with the strong public policy favoring full payment of minimum wages, which the Legislature has effectuated by making payment of less than the minimum wage unlawful. (Lab. Code, § 1197.)

The judgment is reversed with directions to the trial court to deny the petition for writ of mandate.

Rattigan, J., and Christian, J., concurred.

A petition for a rehearing was denied June 16, 1976, and respondent's petition for a hearing by the Supreme Court was denied July 15, 1976. ***349**

Cal.App.1.Dist.,1976.

California State Restaurant Ass'n v. Whitlow

END OF DOCUMENT

H

VICTOR CALOCA et al., Plaintiffs and Appellants,
v.
COUNTY OF SAN DIEGO et al., Defendants and Respondents.
No. D038059.

Court of Appeal, Fourth District, Division 1, California.

Aug. 27, 2002.

SUMMARY

Three sheriff's deputies filed a petition for a writ of mandate challenging procedures adopted by the county civil services commission in conducting an administrative review of a civilian review board's findings of misconduct on the part of the deputies. The commission required the deputies to bear the burden of proving that the findings were erroneous, and also closed some portions of the hearings to the public over the objection of one deputy. The trial court granted the petition, but denied a motion filed by the deputies and the sheriffs' association for recovery of their attorney fees under Code Civ. Proc., § 1021.5 (private attorney general doctrine). (Superior Court of San Diego County, No. GIC747786, Sheridan E. Reed, Judge.)

The Court of Appeal affirmed. The court held that the county board, as the proponent of its findings, had the burden of establishing the facts supporting those findings. An administrative appeal mandated by Gov. Code, § 3304, part of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), must comprise an independent reexamination. This independent factfinding requirement demands at a minimum that the hearing be conducted de novo and that the proponent of any given fact bear the burden of proving it. The court further held that the deputies had a substantial interest in receiving any vindication in a proceeding that was open to the public, and that the county failed to articulate any interest supporting a closed hearing that would outweigh the deputies' substantial interest in an open hearing. Finally, the court held that the trial court did not abuse its discretion in denying the motion for attorney fees, since the deputies and the association had a financial interest in the outcome of this litigation. (Opinion by Benke, Acting P. J., with Huffman and Haller, JJ., concurring.) *434

HEADNOTES

Classified to California Digest of Official Reports

(1) Appellate Review § 121--Dismissal--Grounds--Justiciable Controversy:Mandamus and Prohibition § 72--Mandamus--Appeal.
A county's appeal from a mandamus proceeding was proper, since there was a justiciable controversy between the parties. In this proceeding, three sheriff's deputies had challenged procedures adopted by the county civil services commission in conducting an administrative review of a civilian review board's findings of misconduct on their part. The trial court had concluded that the commission had applied an inappropriate burden of proof, and also that it had improperly closed some portions of the hearings. In determining whether a justiciable controversy exists, a court employs a two-pronged test. Under the first prong, the court will decline to adjudicate a dispute if the abstract posture of the proceeding makes it difficult to evaluate the issues, if the court is asked to speculate on the resolution of hypothetical situations, or if the case presents a contrived injury. Under the second prong, the court will not intervene merely to settle a difference of opinion; there must be an imminent and significant hardship inherent in further delay. Notwithstanding the county's concession that the challenged procedures might ultimately be disapproved by the county board of supervisors, its contention on appeal that the procedures applied by the commission were proper presented a real controversy that required prompt resolution. In addition, if the appellate court were to fail to consider these issues, there was some risk they would either escape review or prompt additional, circuitous litigation.

(2) Law Enforcement Officers § 44--Sheriffs' Deputies--Disciplinary Hearings--Citizen Board Findings of Misconduct--Administrative Review--Burden of Proof.
In a mandamus proceeding in which three sheriff's deputies challenged procedures adopted by the county civil services commission in conducting an administrative review of a civilian review board's findings of misconduct on their part, the trial court did not err in finding that the commission had improperly required the deputies to bear the burden

of proving that the findings were erroneous. An administrative appeal mandated by Gov. Code, § 3304, of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), must comprise an independent reexamination. This independent factfinding requirement demands at a minimum that the hearing be conducted de novo and that the proponent of any given fact bear the burden of proving it. Accordingly, the county board, as the ***435** proponent of its findings, had the burden of establishing the facts supporting those findings.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 774; West's Key Number Digest, Officers and Public Employees 72.61.]

(3) Law Enforcement Officers § 44--Sheriffs' Deputies--Disciplinary Hearings--Citizen Board Findings of Misconduct--Administrative Review--Public Access to Hearing.
In a mandamus proceeding in which three sheriff's deputies challenged procedures adopted by the county civil services commission in conducting an administrative review of a civilian review board's findings of misconduct on their part, the trial court did not err in finding that the commission had improperly required portions of the hearings to be closed to the public over the objection of one deputy. The deputies had a substantial interest in receiving any vindication in a proceeding that was open to the public, since it was the very public nature of the board's findings that gave rise to the deputies' right to administrative appeal under Gov. Code, § 3304, of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). This administrative appeal was an adjudicative process by which the deputies hoped to restore their reputations. Further, the county failed to articulate any interest supporting a closed hearing that would outweigh the deputies' substantial interest in an open hearing. At a minimum, the Public Safety Officers Procedural Bill of Rights Act requires that where public safety officers have a substantial interest in a particular procedure, a public agency must articulate some reason that use of that procedure is nonetheless unwarranted or unduly burdensome.

(4) Costs § 19--Attorney Fees--Private Attorney General Doctrine-- Considerations--Whether Party Has Financial Interest in Outcome of Litigation.
In a mandamus proceeding in which three sheriff's deputies challenged procedures adopted by the county civil services commission in conducting an administrative review of a civilian review board's findings of misconduct on their part, the trial court did not abuse its discretion in denying a motion for attorney fees filed by the deputies and the sheriffs' association under Code Civ. Proc., § 1021.5 (private attorney general doctrine). An award of attorney fees under § 1021.5 requires that the claimant show that the cost of its legal victory transcended its personal interest. The deputies and the association failed to meet this burden, since they had a very concrete personal and pecuniary stake in the action, and thus a financial incentive to bring the action. ***436**

COUNSEL

Law Offices of Everett L. Bobbitt, Everett L. Bobbitt and Sanford A. Toyen for Plaintiffs and Appellants.

John J. Sansone, County Counsel, and C. Ellen Pilsecker, Deputy County Counsel, for Defendants and Respondents.

BENKE, Acting P. J.

In a prior appeal in this case we held that under the provisions of the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) (Public Safety Officers Bill of Rights), three sheriff's deputies, respondents Victor Caloca, Ronald Cuevas and Rick Simica, were entitled to administrative review of misconduct findings made by the Civilian Law Enforcement Review Board (CLERB). (*Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1223 [85 Cal.Rptr.2d 660] (*Caloca I*).) Although the sheriff's department had conducted its own investigation of the misconduct allegations and determined that none of the officers was subject to disciplinary action, we found the deputies were nonetheless entitled to administrative review of the adverse CLERB findings because the record disclosed the review board's findings would impair the officers' ability to compete for promotions. (*Ibid.*) We left to respondent County of San Diego (the county) formulation of the specific procedures which would govern the administrative review. (*Ibid.*)

On remand respondent County of San Diego Civil Service Commission (the commission) adopted procedures which, among other matters, required that the officers bear the burden of establishing that the misconduct findings were erroneous and permitted the commission to close some portions of its hearings to the public notwithstanding the objection of a deputy. By way of a second petition for a writ of mandate, the deputies and respondent San Diego County Deputy Sheriffs Association (Sheriffs Association) challenged the commission's

procedures. In granting the petition for a writ of mandate the trial court found that the burden of proof could not be placed on a deputy and that without the consent of a deputy an administrative hearing could not be closed to the public. On appeal the commission argues these aspects of the procedure it adopted were valid.

We affirm. At a minimum an administrative appeal requires independent fact finding in a de novo proceeding. In such a proceeding the proponent of any fact bears the burden of establishing it. Thus the commission could not ***437** place on officers the burden of refuting the civilian review board's misconduct findings. Moreover, the commission has not shown any substantial need to close its hearings over the objection of a deputy who is challenging an adverse finding.

By way of a cross-appeal the deputies and the Sheriffs Association argue they were entitled to recover their attorney fees under Code of Civil Procedure section 1021.5. Like the trial court we find the costs the deputies and the Sheriffs Association incurred in this litigation over the particular procedures used to review the misconduct findings did not entirely transcend their own interest in the outcome of the litigation. Thus we find no abuse of discretion in the trial court's order denying their motion for attorney fees.

Summary

The background of this case was fully set forth in our opinion in *Caloca I*: "In 1990, County voters amended their charter to require County Board of Supervisors to establish CLERB. (San Diego County Charter, § 606.) Pursuant to the charter amendment, the board of supervisors enacted County of San Diego Ordinance No. 7880 (N.S.), adding article XVIII (entitled Citizens Law Enforcement Review Board) to the County's administrative code. '[CLERB is established] ... to advise the Board of Supervisors, the Sheriff and the Chief Probation Officer on matters related to the handling of citizen complaints which charge peace officers and custodial officers employed by the County in the Sheriff's Department or the Probation Department with misconduct arising out of the performance of their duties. [CLERB] is also established to receive and investigate specified citizen complaints and investigate deaths arising out of or in connection with activities of peace officers ....' (San Diego Co. Admin. Code, § 340.)

"CLERB makes (1) findings of misconduct and recommendations for imposition of discipline against individual deputies, and also (2) recommendations for changes in policies and procedures of the Sheriff's Department. (San Diego County Admin. Code, § 340.9(c) & (f).) However, '[i]t is the purpose and intent of the Board of Supervisors in constituting [CLERB] that [CLERB] will be advisory only and shall not have any authority to manage or operate the Sheriff's Department or the Probation Department or direct the activities of any County officers or employees in the Sheriff's Department .... [CLERB] shall not decide policies or impose discipline against officers or employees of the County in the Sheriff's Department or the ***438** Probation Department.' (San Diego County Admin. Code, § 340.)" (*Caloca I, supra,* 72 Cal.App.4th at pp. 1212-1213.) [FN1] ***439**

FN1 As we explained in *Caloca I*, CLERB consists of "11 review board members and a small staff including an executive officer and a special investigator. (San Diego County Admin. Code, § 340.2; CLERB Rules & Regs., § § 3.1 & 3.9.) CLERB's review board members are County residents appointed by the board of supervisors. (San Diego County Admin. Code, § 340.3.) They serve three-year terms, and may not be appointed for more than two consecutive terms. (San Diego County Admin. Code, § 340.4.) CLERB's review board members are not compensated, serve at the pleasure of the board of supervisors, and may be removed at any time. (San Diego County Admin. Code, § § 340.5, 340.8.) [¶] ... [¶]

"The County administrative code authorizes CLERB to prepare and adopt rules and regulations for the conduct of its business, subject to approval by the board of supervisors. (San Diego County Admin. Code, § 340.7(b).)

"These rules and regulations provide for processing and investigating citizen complaints. CLERB transmits copies of all citizen complaints received to the sheriff or chief probation officer, as appropriate. (CLERB Rules & Regs., § 9.1.) CLERB's executive officer and staff initially screen the complaints, classifying them as appropriate for investigation, deferral, or summary dismissal. (CLERB Rules & Regs., § 9.2(a).) CLERB's entire review board must review and approve the classification before ' significant further action' is taken on any complaint. (CLERB Rules & Regs., § 9.2(b).)

"In cases where a complaint is approved as

appropriate for investigation, CLERB's investigator typically: (1) interviews the complainant, the aggrieved party, each subject officer, and witnesses; (2) examines the scene of the incident; and (3) views and analyzes physical evidence associated with the incident. (CLERB Rules & Regs., § 9.3(a).) The investigator attempts to secure written statements under oath from all participants and witnesses to the alleged incident. (CLERB Rules & Regs., § 9.3(c).)

"The investigator prepares a written report, which includes a summary of the investigation along with the information and evidence disclosed by the investigation. (CLERB Rules & Regs., § 9.4.) The report also contains a procedural recommendation by the executive officer to the review board as to whether the case is appropriate for disposition at that time or should be referred to a three-member panel for an investigative hearing. (CLERB Rules & Regs., § 9.4.)

"The investigative report is submitted to CLERB's chairperson, who may attach his or her own recommendation. (CLERB Rules & Regs., § 9.4.) The report is then submitted to the entire CLERB. (CLERB Rules & Regs., § 9.4.) The chairperson provides the complainants, aggrieved party, and each subject officer with: (1) written notice that the complaint will be considered by CLERB; (2) any recommendations on summary disposition or procedural matters; (3) a copy of the investigative report and summary, along with notification that all statements, records, reports, exhibits, and other file evidence are available on request, except where disclosure is prohibited by law; (4) written notice the parties may consult an attorney if desired who may represent them at any hearings; and (5) a copy of CLERB Rules and Regulations. (CLERB Rules & Regs., § 9.8.)

"The complainant, subject officer, CLERB's executive officer, or any member of CLERB's 11-member board may request an investigative hearing for some or all of the allegations of the complaint. (CLERB Rules & Regs., § 10.1.) However, CLERB Rules and Regulations make no provision as to the effect of such a request.

"CLERB's entire review board decides whether (1) an investigative hearing should be held, or (2) the entire review board should review and determine the complaint based on the investigative report and the evidence in the investigative file without a hearing. (CLERB Rules & Regs., § 9.5.) An investigative hearing may be deemed necessary where: (1) there has been an undue lapse of time since the incident; (2) there is additional evidence not disclosed by the investigative report; (3) there is reason to question the findings and conclusion of the investigative report; (4) a hearing would advance public confidence in CLERB's citizen complaint process; or (5) personal appearance by the parties would facilitate CLERB's factfinding process. (CLERB Rules & Regs., § 10.2.)

"In cases where CLERB decides to review and determine a citizen complaint based on the investigative report and file evidence *without* an investigative hearing, the entire CLERB deliberates and prepares a final report which contains findings of fact and overall conclusions as to each allegation of misconduct. (CLERB Rules & Regs., § § 9.6, 16.6.) If CLERB determines the allegations are proven by a preponderance of the evidence, it sustains findings of misconduct against the subject officer. (CLERB Rules & Regs., § § 9.6, 14.9.)

"The final report adopted by CLERB is forwarded to the board of supervisors, the sheriff or chief probation officer, the complainants, and each subject officer. (CLERB Rules & Regs., § 16.8.) The complainants or subject officers may request the final report be reopened and reconsidered by CLERB if previously unknown evidence is discovered that was not available to CLERB and there is a 'reasonable likelihood' the new evidence will alter the final report's findings and conclusions. (CLERB Rules & Regs., § 16.9.) Additionally, the board of supervisors or CLERB itself upon its own initiative may reopen a final report when reconsideration is in the public interest. (CLERB Rules & Regs., § 16.9.)" (*Caloca I, supra*, 72 Cal.App.4th at pp. 1213-1215, fn. omitted.)

"Here CLERB sustained findings of misconduct against each of the four appellants arising from three separate incidents. CLERB's findings were based on investigative reports; no hearings were conducted.

"On May 9, 1995, CLERB issued its report concerning allegations of misconduct against five

officers arising from the February 1992 shooting of Paul Reynolds by Deputy Jeffrey Jackson. CLERB sustained an allegation of misconduct against Deputy Caloca, finding he 'committed an act of misconduct when he improperly investigated the Reynolds homicide by asking Deputy Jackson leading questions ....' CLERB found Deputy Caloca asked Deputy Jackson questions that suggested answers creating the legal foundation for justifiable use of force.

"On December 12, 1995, CLERB issued its report concerning the December 1991 shooting death of Esquiel Tinajero-Vasquez (Tinajero) by Deputy Smith and the investigation of the incident by Deputy Simica. CLERB sustained two findings of misconduct against Deputy Smith, finding (1) his attempt to stop and detain Tinajero was without reasonable cause or legal authority, and (2) his use of lethal force was excessive. CLERB sustained one finding of misconduct against Deputy Simica, finding his narrative description, diagram, and report of the crime scene were misleading and incomplete.

"On May 14, 1996, CLERB issued its report concerning the October 1994 detention of Robert Thompson and Dennis Webb by California Fish and Game Officer Lieutenant Turner, which occurred in Deputy Cuevas's presence. CLERB sustained three findings of misconduct: (1) Deputy Cuevas ***440** acted in a manner inconsistent with the sheriff's department's mission and ethics by refusing to prevent Lieutenant Turner from conducting an illegal detainment of Thompson and Webb; (2) Deputy Cuevas failed to safeguard Thompson; and (3) Deputy Cuevas's report contained false or misleading information.

"In its reports against Deputies, CLERB made general recommendations for policy changes to the sheriff's department. Although CLERB sustained findings of serious misconduct against Deputies, the final reports were silent as to recommendations of discipline. CLERB's reports indicate none of the Deputies responded to its investigator's request for a statement or interview.

"The San Diego Sheriff's Department investigated the same incidents giving rise to CLERB's reports, and found no misconduct by any of the Deputies. [¶] ... [¶]

"In June 1996, counsel for Deputies wrote letters to the Civil Service Commission, requesting it hold liberty interest hearings or alternatively administrative appeals to allow Deputies an opportunity to challenge CLERB's findings. The Civil Service Commission denied Deputies' requests.

"Deputies and Sheriffs Association filed a petition in superior court seeking a writ of mandate to compel County and the Civil Service Commission to conduct: (1) liberty interest hearings to allow Deputies to clear their names of CLERB's findings; or alternatively (2) administrative appeals pursuant to the Public Safety Officers Procedural Bill of Rights Act on the ground that CLERB's findings of misconduct constitute punitive action.

"In support of their petition, Deputies submitted the declaration of Assistant Sheriff Thomas Zoll, who is in charge of the human resource services bureau for the sheriff's department. Zoll stated his department when considering a deputy for advancement 'may consider findings and evaluations from other credible agencies or boards,' including 'credible reports or findings from such sources as ... a citizens review board.' Further, Zoll stated negative findings that a deputy committed an act of misconduct 'published by a credible source ... would be given consideration in personnel decisions, and may have an adverse impact on the career of the deputy ... [e]ven though the [Sheriff's] department may have investigated the matter and reached a different conclusion ....'

"The trial court denied Deputies' petition, finding (1) Deputies are not entitled to liberty interest hearings as they failed to show a present deprivation of liberty interests, and (2) Deputies are not entitled to administrative ***441** appeals as they failed to show punitive action." (*Caloca I, supra,* 72 Cal.App.4th at pp. 1215-1217, fns. omitted.)

In our opinion in *Caloca I* we reversed the trial court's order in part. We found that although the deputies were not entitled to liberty interest hearings, they were entitled to administrative appeals under Government Code section 3304, subdivision (b). In rejecting the deputies' contention that due process required that they have an opportunity to appeal the CLERB findings, we stated: "Although it is clear CLERB's findings of serious misconduct stigmatize Deputies and may well impact their law enforcement careers in the future, we must focus on the absence of evidence in the record showing CLERB's allegedly false findings of misconduct were *made in connection with or have resulted in the loss* of a government benefit. The law requires there not only be government action but also the loss of a government benefit. [Citations.] Because the record

on appeal contains no evidence of an actual loss of a government benefit suffered in connection with CLERB's report, the trial court correctly concluded Deputies were not entitled to liberty interest hearings." (*Caloca I, supra,* 72 Cal.App.4th at pp. 1219-1220, fn. omitted.)

In finding that the officers were nonetheless entitled to an administrative appeal under Government Code section 3304, we held: "Although CLERB's reports, findings of serious misconduct, and recommendations for discipline or policy changes are advisory only and CLERB has no authority to directly impose discipline against Deputies, our focus is on whether CLERB's findings of misconduct constitute 'punitive action' by a public agency as the term is defined under the Public Safety Officers Procedural Bill of Rights Act. Because CLERB's findings are actions which may lead to adverse employment consequences, they are 'punitive action[s]' within the meaning of the statute. The statute does not require a showing an adverse employment consequence has occurred or is likely to occur, merely that actions 'may lead' to such a consequence. Zoll's unrebutted declaration provides ample evidence of this." (*Caloca I, supra,* 72 Cal.App.4th at p. 1223.)

As we noted at the outset, on remand the commission adopted procedures that placed the burden of proof on deputies and permitted the commission to close its hearings to the public without the consent of the deputies. In addition the commission adopted a rule under which its disposition of a deputy's appeal would not be binding on the county but would only be advisory.

As we also noted, the deputies and the Sheriffs Association challenged the commission's procedures in a second petition for a writ of mandate. In ***442** ruling on the petition the trial court found that the procedures were void because they had not been adopted by the county board of supervisors as required by the county charter. The trial court also found that the procedures were defective in three particulars: (1) their lack of binding force on the county; (2) the burden they placed on deputies challenging CLERB findings; and (3) the power they gave the commission to close its hearings to the public.

On appeal the county and the commission do not challenge the first two aspects of the trial court's ruling: the requirement that the rules be adopted by the board of supervisors and that they be binding on the county. Rather, it has limited its appeal to its contentions that in hearings reviewing CLERB findings the burden of proof may be placed on deputies and the hearings may be closed.

Discussion

I

(1) The deputies and the Sheriffs Association have moved to dismiss the county's appeal. They argue that, in light of the fact the county has not challenged the trial court's determination that the commission's procedural rules were void because they had not been adopted by the board of supervisors, there is no longer any justiciable controversy between the parties. We deny the motion.

In determining whether a justiciable controversy exists, courts employ a two-pronged test: "Under the first prong, the courts will decline to adjudicate a dispute if 'the abstract posture of [the] proceeding makes it difficult to evaluate ... the issues' [citation], if the court is asked to speculate on the resolution of hypothetical situations [citation], or if the case presents a ' contrived injury' [citation]. Under the second prong, the courts will not intervene merely to settle a difference of opinion; there must be an imminent and significant hardship inherent in further delay. [Citation.]" (*Farm Sanctuary, Inc. v. Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 502 [74 Cal.Rptr.2d 75], quoting *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 172-173 [188 Cal.Rptr. 104, 655 P.2d 306].)

First, notwithstanding the county's concession that any procedures it employs must eventually be approved by the board of supervisors, its contentions with respect to the appropriate burden of proof and the power to close hearings present real controversies that require prompt resolution. ***443** The question of what burden is appropriate in an administrative appeal from a CLERB finding was thoroughly litigated below and is clearly and definitively presented on this record, as is the question of whether hearings may be closed. The fact that any procedures will be considered by the board of supervisors does not rob the record of the clarity it presents on these issues.

Second, our failure to consider the county's contentions would impose a significant hardship on the county. Given the vigor with which the deputies have disputed the CLERB findings, there can be no doubt the administrative hearings will take place, but only after the board of supervisors has adopted

procedures for the hearings. Were we to dismiss the county's appeal, the board of supervisors would be compelled to adopt procedures that conform with the trial court's judgment and conduct hearings under them. At that point the deputies would no doubt challenge the county's standing to contest procedures that it had duly adopted, albeit under compulsion of the trial court's order. Thus, as the county points out, if we fail to consider the issues it wishes to assert, there is some risk those issues will entirely escape review or, in any, event, prompt additional circuitous litigation.

In short then, the circumstances presented on this record oblige us to consider the issues the county has raised. [FN2]

> FN2 We deny the deputies' companion motion for sanctions. The issues the county has raised need resolution and are in no sense frivolous. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-651 [183 Cal.Rptr. 508, 646 P.2d 179].)

II

(2) As we have indicated, we found in *Caloca I* that while the deputies' interest in their reputations is not substantial enough to warrant protection under the Constitution, CLERB's findings did impair the deputies' ability to obtain promotions and therefore the Public Safety Officers Bill of Rights gave the deputies the right to administrative review. (*Caloca I, supra*, 72 Cal.App.4th at pp. 1222-1223.)

The fact that the deputies, interest is substantial enough to require a hearing under Government Code section 3304, subdivision (b), largely disposes of the county's contention that at such a hearing the burden of proof may be placed on the deputies. While the precise details of the procedure required by Government Code section 3304 are left to local law enforcement agencies (*Caloca I, supra*, 72 Cal.App.4th at p. 1223), the law is clear that the administrative appeal provided by the Public Officers Bill of Rights requires "an 'independent re-examination' " of an order or decision made. (*Stanton v. City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1443 ***444**[277 Cal.Rptr. 478], quoting *Doyle v. City of Chino* (1981) 117 Cal.App.3d 673, 679 [172 Cal.Rptr. 844], italics added.) At a minimum the reexamination must be conducted by someone who has not been involved in the initial determination. (*Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 1330 [91 Cal.Rptr.2d 171]; *Runyan v. Ellis* (1995) 40 Cal.App.4th 961, 966 [47 Cal.Rptr.2d 356]; *Stanton v. City of West Sacramento, supra*, 226 Cal.App.3d at p. 1443; *Doyle v. City of Chino, supra*, 117 Cal.App.3d at p. 679.) There also is little doubt that the result of any hearing required by Government Code section 3304, subdivision (b), is subject to review by way of a writ of administrative mandate under Code of Civil Procedure section 1094.5 (see *Doyle v. City of Chino, supra*, 117 Cal.App.3d at p. 680) and that Code of Civil Procedure section 1094.5 implicitly requires that an administrative decision maker " 'set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order.' " (*City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 778-779 [122 Cal.Rptr. 543, 537 P.2d 375].)

An independent decision maker who must make factual findings subject to judicial review cannot simply rely on the determination of the individual or agency that has initiated punitive action against a peace officer. Rather, the independent fact finding implicit in the concept of an administrative appeal requires at a minimum that the hearing be treated as a de novo proceeding at which no facts are taken as established and the proponent of any given fact bears the burden of establishing it. As one court has stated: "It is axiomatic, in disciplinary administrative proceedings, that the burden of proving the charges rests upon the party making the charges. [Citations.] [¶] ... The obligation of a party to sustain the burden of proof requires the production of evidence for that purpose. [Citation.]" (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113 [179 Cal.Rptr. 351].)

In this regard the county's reliance on *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795 [20 Cal.Rptr.2d 903], is unpersuasive. *Binkley* discussed the sui generis administrative rights of a police chief who served at the pleasure of a city manager. The chief was discharged because the city manager had lost confidence in his ability to lead the police department and at a postdischarge hearing the police chief was afforded the opportunity to refute a series of conclusions the city manager had reached about the chief's performance. In that unique context the city easily met its burden of proof. By way of a letter to the hearing officer the city manager unambiguously established the only fact necessary to sustain dismissal of the chief: the city manager's subjective loss of confidence in the chief's performance. Thus the court could quite correctly conclude that the burden of proof had not been improperly shifted to the police chief; the record clearly demonstrated there was no dispute the city

had easily met its burden. Here to sustain CLERB's ***445** factual conclusions about the deputies' conduct, the county will have to do far more than present evidence of its subjective views of the deputies' performance.

In sum then, the trial court correctly required that the county bear the burden of sustaining the CLERB findings.

III

(3) In pertinent part the procedures adopted by the commission state: "There shall be no right to a public hearing of the administrative appeal. The Commissioner acting as hearing officer may close all or any portion of the proceeding for the purpose of hearing or receiving otherwise confidential information not subject to public disclosure." Like the trial court, we do not believe the commission had the power to adopt this rule.

In finding in *Caloca I* that an adverse CLERB report was more damaging than a negative job performance review and was therefore, unlike a performance review, a punitive action within the meaning of Government Code section 3304, we stated: " '[T]he Sheriff's Department does not function in a vacuum.... The effectiveness of the department is determined [in] no small degree by the ability of its deputies to be held in high regard by the community and by the agencies and organizations with whom the department interacts on a day to day basis.' Because CLERB was specifically created to investigate and make recommendations concerning public complaints about peace officers, it is unrealistic and inappropriate to conclude CLERB reports-whether positive or negative-would play no role in personnel decisions. [Citation.]

"For these same reasons, a CLERB report sustaining a finding of misconduct against an officer cannot be viewed as analogous to a negative job performance review placed in an officer's personnel file, a circumstance our court previously found insufficient to constitute punitive action entitling the subject officer to an administrative appeal. [Citations.] Unlike an internal performance evaluation, known only to a select number of colleagues, a CLERB report must be sent to the board of supervisors and the sheriff (CLERB Rules & Regs. § 16.8), thus placing it in the public arena and expanding its impact." (*Caloca I, supra*, 72 Cal.App.4th at p. 1222.)

Because it is the very public nature of the CLERB findings that gives rise to the deputies' right to administrative appeal, the deputies have a substantial interest in receiving any vindication in a proceeding which is open to the public. The reversal of a CLERB finding of misconduct that ***446** occurred by way of a closed hearing would not give members of the public the same level of confidence as a proceeding that was fully open to them and in which they had complete access to contradictory evidence offered by a deputy. Thus closed hearings would not provide a deputies with the full vindication they seek.

Against the deputies' substantial interest in a public hearing, the county has not articulated any interest that supports a closed hearing. Rather, it has relied solely on the holding in *Swars v. Council of City of Vallejo* (1949) 33 Cal.2d 867, 873 [206 P.2d 355]. In *Swars* a police officer was accused of misconduct and at a closed civil service commission hearing permitted by a city ordinance he was discharged. The court rejected his contention that he was entitled to an open hearing. "The ordinance implementing the charter of Vallejo provides for a closed hearing, if by unanimous vote the Civil Service Commission shall so order, and its conclusion to exclude the public was based upon sound reason and statutory authority. Swars was not a defendant in a criminal prosecution as defined by article I, section 13, of the state Constitution; nor was the hearing by the commission a proceeding of a 'court of justice' within the meaning of section 124 of the California Code of Civil Procedure." (*Ibid.*)

Because *Swars* was decided long before the 1976 enactment of the Public Safety Officers Bill of Rights, the court there was not required, as we are, to weigh the conflicting due process interests of public safety officers and the public agencies which employ them. (See *Binkley v. City of Long Beach, supra*, 16 Cal.App.4th at p. 1807; *Giuffre v. Sparks, supra*, 76 Cal.App.4th at p. 1331; *Runyan v. Ellis, supra*, 40 Cal.App.4th at pp. 964-965.) At a minimum the Public Safety Officers Bill of Rights requires that where public safety officers have a substantial interest in a particular procedure, a public agency must articulate some reason that use of that procedure is nonetheless unwarranted or unduly burdensome. (See *Binkley v. City of Long Beach, supra*, 16 Cal.App.4th at p. 1807; *Giuffre v. Sparks, supra*, 76 Cal.App.4th at p. 1331; *Runyan v. Ellis, supra*, 40 Cal.App.4th at pp. 964-965.) Because the deputies have an obvious interest in a public hearing and the county has not offered any reason the hearings should be closed, Government Code section 3304 requires that they be open. [FN3]

> FN3 We do agree with the county that hearings conducted by hearing officers, as opposed to multimember commissions, are not subject to the open meeting requirements of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.) (Brown Act) (see *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 375 [20 Cal.Rptr.2d 330, 853 P.2d 496], citing *Wilson v. San Francisco Mun. Ry.* (1973) 29 Cal.App.3d 870, 878-879 [105 Cal.Rptr. 855]). However the hearings we required in *Caloca I* are mandated by the distinct provisions of the Public Safety Officers Bill of Rights. Under that statutory scheme, a hearing may not be closed over a safety officer's objection.
> We think it is worthy to note that if, rather than a hearing officer, the civil service commission itself heard the administrative appeal, the Brown Act would also prevent the hearing from being closed without the deputies' consent. (Gov. Code, § 54957.)

In this regard we think it is important to note the administrative appeal required by Government Code section 3304 is not an *investigatory* process, ***447** in which the need for confidentiality has been well recognized. (See, e.g., *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 527 [247 Cal.Rptr. 378, 754 P.2d 724, 76 A.L.R.4th 951].) It is an adjudicative process by which the deputies hope to restore their reputations.

IV

(4) Finally, we turn to the deputies' and the Sheriffs Association's cross-appeal. They argue that the trial court abused its discretion in denying their motion for attorney fees under Code of Civil Procedure section 1021.5. We find no abuse of discretion.

Code of Civil Procedure section 1021.5 provides in pertinent part: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any." Importantly, "[a]n award of attorney fees under Code of Civil Procedure section 1021.5, requires that the claimant show the cost of its legal victory transcended its personal interest. [Citation.]" (*Jobe v. City of Orange* (2001) 88 Cal.App.4th 412, 419 [105 Cal.Rptr.2d 782].) The deputies and the Sheriffs Association failed to meet this burden.

By way of their declarations in support of their motion, the deputies argued their attorneys spent 131 hours representing them and that counsel was entitled to be compensated at a rate of $250 per hour. Thus, at most, between the three deputies and the Sheriffs Association $32,500 in attorney fees was incurred. As the trial court found, "the individual Petitioners and their association itself do have a very concrete personal and pecuniary stake in this action, and thus a financial incentive to bring the action." Given that personal interest and the amount of fees expended, the trial court could reasonably conclude that the $32,500 incurred did not transcend the deputies' and the Sheriffs Association's interest in the litigation. Thus the trial court did not abuse its discretion in denying the deputies' and the Sheriffs Association's motion. (*Jobe v. City of Orange, supra,* 88 Cal.App.4th at p. 419.) ***448**

Disposition

The judgment is affirmed. Each party shall bear its own costs of appeal.

Huffman, J., and Haller, J., concurred.

On September 25, 2002, the opinion was modified to read as printed above. ***449**

Cal.App.4.Dist.,2002.

VICTOR CALOCA et al., Plaintiffs and Appellants, v. COUNTY OF SAN DIEGO et al., Defendants and Respondents.

END OF DOCUMENT

LORENZA HERNANDEZ, Plaintiff and Appellant,
v.
SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT, Defendant and Respondent.
Civ. No. 66255.

Court of Appeal, Second District, Division 4, California.

May 17, 1983.

SUMMARY

The mother of a passenger who was killed by another passenger while riding on a bus operated by a rapid transit district filed a wrongful death action against the district. The mother alleged that the damages she suffered from the death of her son were proximately caused by the district's breach of its duty to provide its passengers with adequate police protection. The trial court sustained the district's demurrer to the complaint without leave to amend on the ground that the district was immune from liability under Gov. Code, § 845, which immunizes public entities from liability for failure to provide police protection. (Superior Court of Los Angeles County, No. C 363990, John L. Cole, Judge.)

The Court of Appeal affirmed. The court held that, in the absence of a "special relationship," Gov. Code, § 845, immunized the transit district for its failure to provide adequate police protection, and that the mother did not allege the existence of a "special relationship" that would take her cause of action outside the breadth of § 845. (Opinion by McClosky, Acting P. J., with Amerian, J., and Willett, J., [FN*] concurring.)

FN* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Public Transit § 5--Injuries From Operation--Liability for Death of Passenger--Failure to Provide Police Protection.
The mother of a passenger who was killed by another passenger while riding on a bus operated by a rapid transit district failed to state a cause of action against the district for the death of her son. The mother's basic allegation that the damages she suffered from the death of her son were proximately caused by the district's breach of its duty to provide its passengers with adequate ***1064** police protection was insufficient. In the absence of a "special relationship," Gov. Code, § 845, immunizes public entities such as the district from liability for failure to provide police protection, and the mother did not allege the existence of a "special relationship" that would take her cause of action outside the breadth of § 845.

[See **Cal.Jur.3d,** Public Transit, § 73; **Am.Jur.2d,** Municipal, School, and State Tort Liability, § 243 et seq.]

COUNSEL

Kessler & Drasin and Gary Kessler for Plaintiff and Appellant.

Leach & Schneider and James T. Biesty for Defendant and Respondent.

McCLOSKY, Acting P. J.

Nature of the Case

Lorenza Hernandez appeals from the trial court's August 19, 1981, order dismissing this action as to respondent Southern California Rapid Transit District. (Code Civ. Proc., § 581, subd. 3.) Said order of dismissal was filed after respondent's demurrer to appellant's complaint was sustained without leave to amend.

Contentions

Appellant contends (1) that she properly pled a cause of action for negligence against respondent and (2) that respondent is not immune from liability under Government Code sections 820.2, 820.8, or 845.

Facts

On April 17, 1981, appellant filed a complaint for wrongful death against respondent, Hector Holguin, and certain Does alleging [FN1] that her son, John Placentia, was killed on August 22, 1980, by Holguin who was riding as a paying ***1065** passenger on a bus that was owned and operated by respondent Southern California Rapid Transit District (hereafter

SCRTD).

> FN1 We take those allegations, well pleaded, as true. (See *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 746 [167 Cal.Rptr. 70, 614 P.2d 728, 12 A.L.R.4th 701].)

In the first cause of action of her complaint, appellant alleged that after entering said bus and:

"[W]hile said bus was moving, defendant Holguin, Does 1 through 2 inclusive, and decedent proceeded to engage in a loud and boisterous argument and yelled at one another and otherwise acted in a loud, boisterous and unruly manner, thereby greatly disturbing others on the bus.

"Said loud, boisterous and unruly conduct continued until defendant Holguin, Does 1 through 2 inclusive, shot and killed decedent on said bus which was at that time traveling near 419 So. Spring Street.

"At all times material herein, defendants and each of them, had a duty to its passengers, as a common carrier, to use the utmost reasonable care to protect its passengers including decedent from all foreseeable risks of harm.

"At all times material herein, it was foreseeable by defendants, and each of them, that passengers on the bus would be subject to unreasonable risks of harm in that defendants and each of them knew, or should have known, that the area surrounding ..., where decedent was killed, was known to be an area plagued by excessive violence including but not limited to murders, rapes, assaults, batteries and robberies; and further that defendants and each of them knew, or should have known, that the number of violent crimes on Southern California Rapid Transit District buses were increasing and was the cause of increased injuries and harm to SCRTD bus drivers and passengers; and further that defendants, and each of them, knew or should have known that buses traveling the route or line on which decedent was shot and killed were known to be targets of criminal violence against bus drivers and passengers; and further that defendants, and each of them knew or should have known that dangerous or deadly weapons would be carried onto said bus by paying passengers thereby greatly increasing the likelihood of acts of violence in buses; and further that defendants, and each of them, knew or should have known that the arguing and the loud, boisterous and unruly conduct between defendant Holguin and decedent would result in harm to someone on said bus; and further that defendants and each of them knew or should have known, that security on said bus and within said bus system was inadequate to protect persons on said buses.

"At all times material herein, defendants and each of them, breached their duty of due care by failing to provide adequate training for bus drivers in responding properly to criminal violence as hereinbefore mentioned; and further that defendants, and each of them, were aware of said loud, boisterous and ***1066** unruly conduct and with such knowledge failed to take such action as was reasonable and necessary to prevent injury to decedent and other SCRTD bus passengers; and further that defendants, and each of them, negligently failed to provide adequate security to protect persons on said buses from the criminal violence in the areas surrounding said bus routes and lines.

"As a proximate result of said negligence of defendants and each of them, decedent died on August 22, 1980."

In her second cause of action appellant incorporated by reference the first cause of action and alleged, among other things, that respondent violated Civil Code section 2100 which establishes the general duty of care owed by common carriers to their passengers. It provides: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

Respondent demurred to appellant's complaint on the grounds (1) that it failed to state a cause of action upon which relief could be granted, (2) that respondent did not owe appellant a duty of care, and (3) that respondent is immune from liability under Government Code sections 815.2, 820.2, 820.8 and 845. (Code Civ. Proc., § 430.10.)

On August 19, 1981, respondent's demurrer was sustained without leave to amend, the court having found respondent immune from liability under Government Code section 845. The order dismissing respondent from this action was filed the same day, and this appeal followed.

Discussion

The liability of public entities is governed by the California Tort Claims Act (Gov. Code, § 810 et seq.). The statutory provisions of the act establish

immunity from liability for certain acts or omissions of a public entity or its employees. (See Gov. Code, § 815.) [FN2] ***1067**

FN2 Government Code section 815 provides: "Except as otherwise provided by statute:
"(a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person. "(b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person."

(1)Government Code section 845 immunizes public entities, such as respondent, [FN3] from liability for failure to provide police protection. [FN4] It provides: "Neither a public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection is provided, for failure to provide sufficient police protection service."

FN3 Public Utilities Code section 30000 et seq. establishes the Southern California Rapid Transit Law under which the term "district" is defined as the "Southern California Rapid Transit District," (Pub. Util. Code, § 30004) which is a "*public corporation* created for the purposes set forth in this part." (Pub. Util. Code, § 30101; italics added.)
Under Government Code section 811.2, the term "[p]ublic entity includes the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or *public corporation* in the State." (Italics added.)

FN4 Appellant's contention that Government Code section 845 is inapplicable because it only applies when a police department is being sued is without merit. The language of section 845, the Law Revision Commission comment to section 845, and the case law refutes this contention. (See, e.g., *Moncur v. City of Los Angeles* (1977) 68 Cal.App.3d 118 [137 Cal.Rptr. 239] [§ 845 applied to City of Los Angeles and members of the airport commission].)
The Law Revision Commission comment to Government Code section 845 states: "This section grants a general immunity for failure to provide police protection or for failure to provide enough police protection. Whether police protection should be provided at all, and the extent to which it should be provided, are political decisions which are committed to the policy-making officials of government. To permit review of these decisions by judges and juries would remove the ultimate decision-making authority from those politically responsible for making the decisions."

"Since all California governmental tort liability flows from the California Tort Claims Act [citations], the plaintiff must plead facts sufficient to show his cause of action lies outside the breadth of any applicable statutory immunity." (*Keyes v. Santa Clara Valley Water Dist.* (1982) 128 Cal.App.3d 882, 885-886 [180 Cal.Rptr. 586].) This appellant did not do.

Appellant's basic allegation that the damages she suffered from the death of her son were proximately caused by respondent's breach of its duty to provide its passengers with adequate police protection is insufficient. In the absence of a "special relationship," Government Code section 845 immunizes respondent for its failure to do so. Where, however, there exists a "special relationship" between the public entity and plaintiff, liability may be imposed irrespective of any grant of immunity set forth in Government Code section 845. (*Hartzler v. City of San Jose* (1975) 46 Cal.App.3d 6 [120 Cal.Rptr. 5]; cf. *Mann v. State of California* (1977) 70 Cal.App.3d 773 [139 Cal.Rptr. 82].)

Appellant did not, and cannot, [FN5] allege the existence of a "special relationship" that would take her cause of action outside the breadth of Government Code section 845. Hence, she has failed to plead facts essential to establish statutory liability under the act. ***1068**

FN5 At the hearing on the demurrer, appellant informed the court that she had no basis for further amendment of her complaint.

We conclude that the trial court properly sustained respondent's demurrer without leave to amend, and in light of that conclusion, we need not, and do not,

discuss respondent's other claims of immunity.

The judgment (partial order of dismissal) is affirmed.

Amerian, J., and Willett, J., [FN*] concurred.

FN* Assigned by the Chairperson of the Judicial Council.

Cal.App.2.Dist.,1983.

Hernandez v. Southern California Rapid Transit Dist.

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JAIME LEGER et al., Plaintiffs and Appellants,
v.
STOCKTON UNIFIED SCHOOL DISTRICT et al.,
Defendants and Respondents
No. C000367.

Court of Appeal, Third District, California.

Jul 25, 1988.

SUMMARY

A high school student sued his school district and his high school's principal and wrestling coach, alleging they negligently failed to protect him from an attack by a nonstudent in a high school restroom. The trial court sustained defendants' general demurrer to the first amended complaint without leave to amend. The student was battered while changing clothes for wrestling practice. The court's ruling was based in part on Gov. Code, § 845, exempting public entities and employees from liability for deficiencies in police protection services. (Superior Court of San Joaquin County, No. 172920, K. Peter Saiers, Judge.)

The Court of Appeal reversed. The court held Cal. Const., art. I, § 28, subd. (c), the right to safe schools, is not self-executing in the sense of supplying a right to sue for damages, and also that it therefore imposes no mandatory duty on a school district or its employees to make a high school safe and supplies no basis for liability under Gov. Code, § 815.6, for particular injuries proximately resulting from the failure to discharge such a duty. However, the court further held defendants had a duty to use reasonable care to protect the student in the pleaded circumstances, since the school district (under Gov. Code, § 820) and its employees (under Gov. Code, § 815.2) had the same liability as would have obtained in the private sector. Gov. Code, § 845, did not immunize defendants, as the student did not allege failure to provide police protection. (Opinion by Sims, J., with Sparks, Acting P. J., and Watkins, J., [FN*] concurring.) ***1449**

FN* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Pleading § 22--Demurrer as Admission.
A general demurrer admits the truthfulness of properly pleaded factual allegations of the complaint.

(2a, 2b, 2c, 2d) Government Tort Liability § 14--Constitutional Right to Safe Schools--Enforceability.
The right to safe schools (Cal. Const., art. I, § 28, subd. (c)) is not self-executing in the sense of supplying a right to sue for damages. It declares a general right without specifying any rules for its enforcement, imposes no express duty on anyone to make schools safe, and is devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred. Also, there is no indication in the history of the right (e.g., in the ballot arguments) to suggest it was intended to support an action for damages in the absence of enabling and defining legislation.

[See **Cal.Jur.3d (Rev),** Criminal Law, § 2040 et seq.]

(3) Constitutional Law § 5--Operation and Effect--As Limitation of Power.
In accordance with the requirement of Cal. Const., art. I, § 26, that all branches of government comply with constitutional directives and prohibitions, and in the absence of express language to the contrary, every constitutional provision is self-executing in the sense that agencies of government are prohibited from taking official actions that contravene constitutional provisions, and everything done in violation of the Constitution is void.

(4) Constitutional Law § 7--Mandatory, Directory, and Self-executing Provisions--Distinctions.
A constitutional provision may be mandatory without being self-executing. It is self-executing if no legislation is necessary to give effect to it, and if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. A constitutional provision is presumed to be self-executing unless a contrary intent is shown.

[See **Am.Jur.2d,** Constitutional Law, § 139 et seq.]

(5) Government Tort Liability § 14--Mandatory Duty to Make Schools Safe.
Because Cal. Const., art. I, § 28, subd. (c), the right to safe ***1450** schools, does not supply the necessary rule for its implementation, but is simply a declaration of rights, it imposes no mandatory duty on a school district or its employees to make a high school safe and supplies no basis for liability under Gov. Code, § 815.6, for particular injuries proximately resulting from the failure to discharge such a duty.

(6) Government Tort Liability § 16--Claims--Constitutional Torts--Civil Remedy.
The civil remedy for constitutional torts is a direct claim by the victim of the official wrongdoing to secure compensation for the denial of his constitutional rights.

(7a, 7b, 7c, 7d, 7e, 7f) Government Tort Liability § 15-- Supervision of Students--Negligence--Pleading--Battery of Student by Nonstudent.
In a high school student's action against his school district and its employees for negligently failing to protect him from an attack by a nonstudent in a school restroom, the trial court erred in sustaining defendants' general demurrer to the first amended complaint, since defendants had a duty to use reasonable care to protect plaintiff in the pleaded circumstances. Plaintiff alleged he was attacked while changing clothes for wrestling practice and that defendants knew or should have known the rest room was an unsupervised location unsafe for students and that attacks by nonstudents were likely there. Since liability would thus have existed in the private sector, defendants had similar liability under Gov. Code, § § 820 (the school district) and 815.2 (the employees), where no other statutory immunity obtained.

(8) Negligence § 9--Duty of Care--Question of Law.
The existence of a duty of care is a question of law, for legal duties express conclusions that in certain cases it is appropriate to impose liability for injuries suffered.

(9) Negligence § 9.4--Duty of Care--Special Relationship.
As a general rule, one owes no duty to control the conduct of another or to warn those in danger of such conduct. Such a duty may arise, however, if (a) a special relation exists between the actor and the third person that imposes a duty on the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other that gives the other a right to protection.

(10a, 10b) Government Tort Liability § 15--Supervision of Students-- Negligence--Duty of Care--Special Relationship.
A special relationship is formed between a school district (including its individual employees responsible for student supervision) and its students so as ***1451** to impose an affirmative duty to take all reasonable steps to protect the students.

(11) Government Tort Liability § 15--Supervision of Students--Negligence-- Duty of Care--Standard of Care.
A school district and its employees owe the student a duty to use the degree of care that a person of ordinary prudence, charged with comparable duties, would exercise in the same circumstances.

(12a, 12b) Government Tort Liability § 15--Supervision of Students-- Negligence--Duty of Care--Foreseeability.
The existence of a duty of care of a school district and its employees toward a student depends in part on whether a particular harm to the student is reasonably foreseeable. School authorities who know of threats of violence that they believe are well-founded may not refrain from taking reasonable preventive measures simply because violence has yet to occur.

[Liability of university, college, or other school for failure to protect student from crime, note, 1 **A.L.R.4th** 1099.]

(13) Appellate Review § 128--Rulings on Demurrers.
Whether a plaintiff can prove his allegations, or whether it will be difficult to prove them, are not appropriate questions for a reviewing court when ruling on a demurrer.

(14) Government Tort Liability § 15--Supervision of Students--Negligence-- Duty of Care--Availability of Funds.
The availability of funds is a valid policy consideration in determining whether to impose a duty of care on a school district.

(15) Government Tort Liability § 2--As Governed by Statute.
In California, all government tort liability must be based on statute.

(16) Courts § 37--Doctrine of Stare Decisis--

Propositions Not Considered.
It is axiomatic that cases are not authority for propositions not considered.

(17) Schools § 52--Parents and Students--Supervision--Private Schools-- Duty.
A private school is not required to provide constant supervision over pupils at all times. No supervision is required where the school has no reason to think any is required. There is a duty to ***1452** provide supervision with respect to a particular activity if the school officials could reasonably anticipate that supervision was required.

[Tort liability of private schools and institutions of higher learning for negligence of, or lack of supervision by, teachers and other employees or agents, note, 38 **A.L.R.3d** 908.]

(18) Schools § 52--Parents and Students--Supervision--Private Schools-- Negligence--Dangers--Jury Question--Respondeat Superior.
Where a student is injured in performing a task on the direction of school authorities without supervision, the question of private school negligence is one for the jury if there is evidence of the existence of a danger known to the school authorities, who neglect to guard the student against such danger, or if there is an unknown danger that the school, by the exercise of ordinary care as a reasonably prudent person, would have discovered. Where the liability of the private school is sought to be predicated on alleged negligence of teachers or other employees or agents of the school, it is generally recognized that liability on the part of the school may be established under the doctrine of repondeat superior if negligence within the scope of their employment is shown.

(19) Government Tort Liability § 11--Police and Correctional Activities-- Immunity--Purpose.
Gov. Code, § 845, exempting public entities and employees from liability for deficiencies in police protection service, was designed to protect from judicial review in tort litigation the political and budgetary decisions of policy-makers, who must determine whether to provide police officers or their functional equivalents.

COUNSEL

Laura E. Bainbridge for Plaintiffs and Appellants.

Mayall, Hurley, Knutsen, Smith & Green and Peter J. Whipple for Defendants and Respondents.

SIMS, J.

In this case, we hold that the complaint of a high school student states a cause of action for damages against his school district and its ***1453** employees. The complaint alleges employees of the district negligently failed to protect plaintiff Jaime Leger from an attack by a nonstudent in a school restroom, where they knew or reasonably should have known the restroom was unsafe and attacks by nonstudents were likely to occur.

Plaintiff contends the trial court erroneously sustained the demurrer of defendants Stockton Unified School District (District), Dean Bettker, and Greg Zavala to plaintiff's first amended complaint without leave to amend.

(1) Since a general demurrer admits the truthfulness of properly pleaded factual allegations of the complaint (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 804 [205 Cal.Rptr. 842, 685 P.2d 1193]), we recount the pertinent allegations: At all relevant times defendant Bettker was the principal of Franklin High School, and defendant Zavala was a wrestling coach. Each such defendant was an employee of defendant District and was acting within the scope of his employment respecting the matters stated in the complaint.

Plaintiff, a student at Franklin High School, was injured on the school campus when he was battered by a nonstudent on February 14, 1983. Plaintiff was attacked in a school bathroom where he was changing his clothes before wrestling practice. Defendants knew or should have known the bathroom was an unsupervised location unsafe for students and that attacks by nonstudents were likely to occur there.

The complaint pled three legal theories of relief against defendants. The first count alleged a violation of plaintiff's inalienable right to attend a safe school. (Cal. Const., art. I, § 28, subd. (c).) The second count alleged the constitutional provision imposed a mandatory duty on defendants, within the meaning of Government Code section 815.6, to make plaintiff's school safe, the breach of which entitled him to damages. The third count alleged defendants negligently failed to supervise him or the location where he was changing his clothes for wrestling practice, knowing or having reason to know the location was unsafe for unsupervised students.

Discussion

I *Article I, section 28, subdivision (c) of the California Constitution is not self-executing in the sense of providing a right to recover money damages for its violation.*

(2a) Plaintiff first argues that article I, section 28, subdivision (c) of the California Constitution is self-executing and by itself provides a right to ***1454** recover damages. That provision, enacted as a part of "the Victim's Bill of Rights," reads: "*Right to Safe Schools.* All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." (Referred to hereafter for convenience as section 28(c).)

Article I, section 26 of the California Constitution provides: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

(3) Under this constitutional provision, all branches of government are required to comply with constitutional directives (*Mosk v. Superior Court* (1979) 25 Cal.3d 474, 493, fn. 17 [159 Cal.Rptr. 494, 601 P.2d 1030]; *Bauer-Schweitzer Malting Co. v. City and County of San Francisco* (1973) 8 Cal.3d 942, 946 [106 Cal.Rptr. 643, 506 P.2d 1019]) or prohibitions (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 8 [95 Cal.Rptr. 329, 485 P.2d 529, 46 A.L.R.3d 351]). Thus, in the absence of express language to the contrary, *every* constitutional provision is self-executing in the sense that agencies of government are prohibited from taking official actions that contravene constitutional provisions. (*Ibid.*) "Every constitutional provision is self-executing to this extent, that everything done in violation of it is void." (*Oakland Paving Co. v. Hilton* (1886) 69 Cal. 479, 484 [11 P. 3]; see *Sail'er Inn, Inc. v. Kirby, supra*, 5 Cal.3d at p. 8.)

(2b) The question here is whether section 28(c) is "self-executing" in a different sense. Our concern is whether section 28(c) provides any rules or procedures by which its declaration of rights is to be enforced, and, in particular, whether it provides citizens with a specific *remedy* by way of damages for its violation in the absence of legislation granting such a remedy. (See *Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 Cal.App.3d 816, 858 [182 Cal.Rptr. 813] (dis. opn. of Kaufman, J.).)

(4) "A provision may be mandatory without being self-executing. It is self-executing if no legislation is necessary to give effect to it, and if there is nothing to be done by the Legislature to put it into operation. A constitutional provision contemplating and requiring legislation is not self-executing. [Citation.] In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms and there is no language indicating that the subject is referred to the Legislature for action [citation]; and such provisions are inoperative in cases where the object to be accomplished is made to depend in whole or in part on subsequent legislation." (*Taylor v. Madigan* (1975) 53 Cal.App.3d 943, 951 [126 Cal.Rptr. 376].)
***1455**

The following rule has been consistently applied in California to determine whether a constitutional provision is self-executing in the sense of providing a specific method for its enforcement: "'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.'" (*Older v. Superior Court* (1910) 157 Cal. 770, 780 [109 P. 478], quoting Cooley, Constitutional Limitations (7th ed. 1903) p. 121; see *Winchester v. Howard* (1902) 136 Cal. 432, 440 [69 P. 77]; *Chesney v. Byram* (1940) 15 Cal.2d 460, 462 [101 P.2d 1106]; *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 637 [268 P.2d 723]; *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 594 [131 Cal.Rptr. 361, 551 P.2d 1193].)

We recognize that a constitutional provision is presumed to be self-executing unless a contrary intent is shown. (*Winchester* v. *Howard, supra*, 136 Cal. at p. 440; 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 38, p. 3278.) (2c) Here, however, section 28(c) declares a general right without specifying *any* rules for its enforcement. It imposes no express duty on anyone to make schools safe. It is wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred. Rather, "'it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.'" (5)**(See fn. 1.)** (*Older v. Superior Court, supra*, 157 Cal. at p. 780, citation omitted.) [FN1]

FN1 For this reason, and contrary to

> plaintiff's contention, section 28(c) does not supply a basis for liability under Government Code section 815.6, which provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." Because section 28(c) does not supply the necessary rule for its implementation, but is simply a declaration of rights, it imposes no mandatory duty upon defendants to make Franklin High School safe. (See *Nunn v. State of California* (1984) 35 Cal.3d 616, 624-626 [200 Cal.Rptr. 440, 677 P.2d 846].)

(2d) Although not cited by plaintiff, we note that in *White v. Davis* (1975) 13 Cal.3d 757 [120 Cal.Rptr. 94, 533 P.2d 222], the court held that the constitutional provision protecting the right of privacy (Cal. Const., art. I, § 1) [FN2] was self-executing and supported a cause of action for an injunction. (13 Cal.3d at pp. 775-776.)

> FN2 Article 1, section 1 provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

White's conclusion was based upon an "election brochure 'argument,' a statement which represents ... the only 'legislative history' of the constitutional ***1456** amendment ...." (*Id.*, at p. 775.) The court reasoned that a statement in the brochure that the amendment would create "'a legal and enforceable right of privacy for every California'" showed that the privacy provision was intended to be self-executing. (*Ibid.*)

By way of contrast, there is no indication in any of the sparse "legislative history" of section 28(c) to suggest it was intended to support an action for damages in the absence of enabling and defining legislation. The ballot arguments do not so much as hint at such a remedy. "The Victim's Bill of Rights" itself declares that, "The rights of victims pervade the criminal justice system, encompassing ... the ... basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished *so that the public safety is protected and encouraged as a goal of highest importance.* [¶] *Such public safety extends to public ... senior high school campuses, where students and staff have the right to be safe and secure in their persons.* [¶] *To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary* and proper as deterrents to criminal behavior and to serious disruption of people's lives." (Art. I, § 28, subd. (a), italics added.) Thus, the goal of public safety, including the safety of those in our schools, is to be reached through reforms in the criminal laws (see *Brosnahan* v. *Brown* (1982) 32 Cal.3d 236, 247-248 [186 Cal.Rptr. 30, 651 P.2d 274]); a private right to sue for damages is nowhere mentioned nor implied. Since the enactment of section 28(c) was accomplished without "legislative history" comparable to that relied on by the court in *White* v. *Davis, supra*, 13 Cal.3d 757, that case does not aid plaintiff's theory.

We hold that section 28(c) is not self-executing in the sense of supplying a right to sue for damages. [FN3] (*Older v. Superior Court, supra*, 157 Cal. at p. 780.)

> FN3 This conclusion does not mean that section 28(c) is without practical effect. To implement section 28(c), the Legislature has enacted chapter 1.1 of part 1, title 15 of the Penal Code (§ § 627- 627.10) establishing procedures by which nonstudents can gain access to school grounds and providing punishments for violations. The Legislature has also enacted chapter 2.5 of part 19 of division 1 of title 1 of the Education Code (§ § 32260-32296), the Interagency School Safety Demonstration Act of 1985, "to encourage school districts, county offices of education, and law enforcement agencies to develop and implement interagency strategies, programs, and activities which will improve school attendance and reduce the rates of school crime and vandalism." (Ed. Code, § 32261.)

Plaintiff relies upon *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825 [134 Cal.Rptr. 839], and *Laguna Publishing Co. v. Golden Rain Foundation, supra*, 131 Cal.App.3d 816 for the proposition a self-executing constitutional provision

supports an action for damages. *Porten*, following *White v. Davis, supra*, 13 Cal.3d 757, held a plaintiff could sue for ***1457** damages for violation of his state constitutional right of privacy. (*Porten, supra*, 64 Cal.App.3d at p. 832.) We have no occasion here to determine whether we agree with *Porten*, because it is premised on the violation of a different, self-executing provision of the Constitution. Although not cited by plaintiff, *Fenton v. Groveland Community Services Dist.* (1982) 135 Cal.App.3d 797 [185 Cal.Rptr. 758] is similarly distinguishable because it relies upon the self-executing nature of article II, section 2 of our Constitution, guaranteeing a right to vote. (*Fenton, supra*, at p. 805.)

Laguna Publishing Co. v. Golden Rain Foundation, supra, 131 Cal.App.3d 816, also fails to support plaintiff's theory. There, the court held plaintiff could pursue recovery of damages for violation of its right to free speech guaranteed by article I, section 2 of our state Constitution. (Pp. 853-854.) However, contrary to plaintiff's suggestion, *Laguna Publishing* was not premised upon the self-executing nature of the subject constitutional provision. (See *id.*, at p. 851.) (6)**(See fn. 4.)** Rather, *Laguna Publishing* followed *Melvin v. Reid* (1931) 112 Cal.App. 285 [297 P. 91] in allowing a cause of action for violation of free speech rights without regard to the self-executing nature of the constitutional provision. [FN4] (*Laguna Publishing Co., supra*, at pp. 852-853.) The court also relied upon Civil Code sections 1708 and 3333. (*Ibid.*) The case is therefore inapposite to the theory advanced by plaintiff. ***1458**

FN4 To the extent *Laguna Publishing* follows *Melvin v. Reid, supra*, 112 Cal.App. 285, the case represents a specie of "constitutional tort." "'The civil remedy for *constitutional* torts is a direct claim by the victim of the official wrongdoing to secure compensation for the denial of his *constitutional* rights.' [Citation.]" (*Fenton v. Groveland Community Services Dist., supra*, 135 Cal.App.3d at p. 803, italics in original; see *Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 388 [29 L.Ed.2d 619, 91 S.Ct. 1999]; *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 474-475 [156 Cal.Rptr. 14, 595 P.2d 592]; *Stalnaker v. Boeing Co.* (1986) 186 Cal.App.3d 1291, 1302-1308 [231 Cal.Rptr. 323].) "Without question, the rebirth of reliance on state bills of rights is one of the most fascinating developments in civil rights law of the last two decades." (Friesen, *Recovering Damages for State Bills of Rights Claims* (1985) 63 Tex.L.Rev. 1269.) "The literature on the renewed use of state constitutions is already too long to collect conveniently in a footnote." (*Id.*, at fn. 2; see, e.g., Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules* (1986) 19 Conn.L.Rev. 53; Comment, *The Right to Safe Schools: A Newly Recognized Inalienable Right* (1983) 14 Pac. L.J. 1309; Love, *Damages: A Remedy for the Violation of Constitutional Rights* (1979) 67 Cal.L.Rev. 1242; Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood* (1968) 117 U.Pa.L.Rev. 1.)
"Whether a cause of action can be inferred from the Constitution, without any explicit statutory authorization, is a complex question and one which is mired in the dark ages of constitutional law." (Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official* (1976) 49 So.Cal.L.Rev. 1322, 1354, fn. omitted.) Plaintiff has not argued that he is entitled to recover money damages for violation of a constitutional right even where the subject constitutional provision is not self-executing. We will not investigate this "complex question" on our own motion. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 479, pp. 469-470.)

II *Defendant District is liable to plaintiff pursuant to Government Code sections 815.2 and 820.*

(7a) Plaintiff also contends that ordinary principles of tort law imposed a duty upon defendants to use reasonable care to protect him from the attack in the pleaded circumstances. At this point, we agree.

A. *Plaintiff has pled that defendants owed him a duty of care.*

The first question is whether defendants owed plaintiff a duty of care. (*Williams v. State of California* (1983) 34 Cal.3d 18, 22 [192 Cal.Rptr. 233, 664 P.2d 137].)

(8) The existence of a duty of care is a question of law, for legal duties express conclusions that in certain cases it is appropriate to impose liability for injuries suffered. (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434 [131 Cal.Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166]; *Dillon v. Legg*

(1968) 68 Cal.2d 728, 734 [69 Cal.Rptr. 72, 441 P.2d 912, 29 A.L.R.3d 1316].)

(9) "As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct. Such a duty may arise, however, if '(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection.' (Rest. 2d Torts (1965) § 315; *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 751-752 [167 Cal.Rptr. 70, 614 P.2d 728]; *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166].)" (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 203 [185 Cal.Rptr. 252, 649 P.2d 894]; see also *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 788- 789 [221 Cal.Rptr. 840, 710 P.2d 907]; *Williams v. State of California, supra*, 34 Cal.3d at p. 23.)

In *Rodriguez v. Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707 [230 Cal.Rptr. 823], the court considered whether a school district could be held liable when a student was assaulted on campus by a nonstudent. (10a) On the question of duty, the court concluded "that a special relationship is formed between a school district and its students so as to impose an affirmative duty on the district to take all reasonable steps to protect its students." (P. 715.)

(7b), (10b) Although *Rodriguez* did not address the question, we think it obvious that the individual school employees responsible for supervising ***1459** plaintiff, such as the principal and the wrestling coach, also had a special relation with plaintiff upon which a duty of care may be founded. (See *Tarasoff v. Regents of University of California, supra*, 17 Cal.3d at p. 436.) A contrary conclusion would be wholly untenable in light of the fact that "the right of all students to a school environment fit for learning cannot be questioned. Attendance is mandatory and the aim of all schools is to teach. Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming. ... [¶] The public school setting is one in which governmental officials are directly in charge of children and their environs, including where they study, eat and play. ... Further, the responsibility of school officials for each of their charges, the children, is heightened as compared to the responsibility of the police for the public in general." (*In re William G.* (1985) 40 Cal.3d 550, 563 [221 Cal.Rptr. 118, 709 P.2d 1287].)

(11) *Rodriguez* notwithstanding, defendants still contend they should owe no duty to protect plaintiff from this attack. They correctly contend that neither school districts nor their employees are the insurers of the safety of their students. (*Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 747 [87 Cal.Rptr. 376, 470 P.2d 360].) But plaintiff makes no assertion of strict liability; rather, the complaint pleads negligence. Defendants do owe plaintiff a duty to use the degree of care which a person of ordinary prudence, charged with comparable duties, would exercise in the same circumstances. (*Ibid.*)

(12a) Of course, in the present circumstances, the existence of a duty of care depends in part on whether the harm to plaintiff was reasonably foreseeable. (See *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 125 [211 Cal.Rptr. 356, 695 P.2d 653].) Neither schools nor their restrooms are dangerous places per se. (Cf. *Peterson v. San Francisco Community College Dist., supra*, 36 Cal.3d at p. 812.) Students are not at risk merely because they are at school. (See *Chavez v. Tolleson Elementary School Dist.* (1979) 122 Ariz. 472 [595 P.2d 1017, 1 A.L.R.4th 1099].) A contrary conclusion would unreasonably "require virtual round-the-clock supervision or prison-tight security for school premises, ..." (*Bartell v. Palos Verdes Peninsula Sch. Dist.* (1978) 83 Cal.App.3d 492, 500 [147 Cal.Rptr. 898].)

(7c) Here, however, plaintiff's first amended complaint pled that defendants knew or should have known that he was subject to an unusual risk of harm at a specific location on school grounds. Thus, the complaint alleged defendants knew or should have known that members of the junior varsity wrestling team (including plaintiff) were changing clothes before wrestling practice in the unsupervised boys' restroom, that defendants knew or should have known the unsupervised restroom was unsafe for students, ***1460** and that attacks were likely to occur there. These allegations sufficiently state that the harm to plaintiff was reasonably foreseeable in the absence of supervision or a warning. Plaintiff had no obligation to plead that prior acts of violence had occurred in the restroom. (See *Isaacs v. Huntington Memorial Hospital, supra*, 38 Cal.3d at p. 129.) (12b) For example, school authorities who know of threats of violence that they believe are well-founded may not refrain from taking reasonable preventive measures simply because violence has yet to occur.

(See *id.*, at pp. 125-126.)

(13) Whether plaintiff can prove these allegations, or whether it will be difficult to prove them, are not appropriate questions for a reviewing court when ruling on a demurrer. (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 936 [231 Cal.Rptr. 748, 727 P.2d 1029].)

Defendants argue they should owe no duty to plaintiff because school districts cannot afford the liability. (14) This court has recognized that the availability of funds is a valid policy consideration in determining whether to impose a duty of care on a school district. (*Wright v. Arcade School Dist.* (1964) 230 Cal.App.2d 272, 278 [40 Cal.Rptr. 812]; *Raymond v. Paradise Unified School Dist.* (1963) 218 Cal.App.2d 1, 8 [31 Cal.Rptr. 847]; see also *Bartell v. Palos Verdes Peninsula Sch. Dist., supra*, 83 Cal.App.3d at p. 500.)

(7d) However, the record contains no information bearing upon the budgets of school districts generally, nor of this defendant District in particular, nor upon the cost or availability of insurance. Nor have we been cited to materials of which we might take judicial notice. With the record in this posture, we agree with defendants, who candidly admit in their brief, "If there is a remedy to this situation, it is not with the courts but with the Legislature."

We therefore conclude plaintiff has adequately pled that defendants breached a duty of care they owed him.

B. *There is a statutory basis for liability.*

Even though *Rodriguez* v. *Inglewood Unified School Dist., supra*, determined a school district has a duty to protect students on campus from violent assaults by third parties, the court concluded the defendant school district was not liable because no statute provided for liability. (186 Cal.App.3d at pp. 715-716.) (15) "[I]n California, all government tort liability must be based on statute. ..." (*Lopez v. Southern Cal. Rapid Transit Dist., supra*, 40 Cal.3d at p. 785, fn. 2, citation omitted.)

However, *Rodriguez* did not examine Government Code sections 815.2 and 820, imposing liability on a public entity for the torts of its employees. ***1461** (All further statutory references are to the Government Code unless otherwise indicated.) (16) "It is axiomatic that cases are not authority for propositions not considered." (*People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7 [82 Cal.Rptr. 724, 462 P.2d 580]; *Milicevich v. Sacramento Medical Center* (1984) 155 Cal.App.3d 997, 1005-1006 [202 Cal.Rptr. 484].)

Here, as we have noted, plaintiff has sued employees of the District and pursues the District on a theory of respondeat superior. (See *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967-968 [227 Cal.Rptr. 106, 719 P.2d 676].) Section 820 provides in relevant part that except as otherwise statutorily provided, "a public employee is liable for injury caused by his act or omission to the same extent as a private person." (Subd. (a).) Section 815.2 provides in pertinent part that the entity "is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would ... have given rise to a cause of action against that employee ...." (Subd. (a).) Thus, "the general rule is that an employee of a public entity is liable for his torts to the same extent as a private person (§ 820, subd. (a)) and the public entity is vicariously liable for any injury which its employee causes (§ 815.2, subd. (a)) to the same extent as a private employer (§ 815, subd. (b))." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 463, fn. omitted [183 Cal.Rptr. 51, 645 P.2d 102]; see Van Alstyne, Cal. Government Tort Liability Practice (Cont.Ed.Bar 1980) § § 2.31- 2.32, pp. 74-80.)

The next question is: would a private school and its employees be liable in the pleaded circumstances? The answer is "yes."

(17) "As a general rule, it has been held that a [private] school is not required to provide constant supervision over pupils at all times. Thus, no supervision is required where the school has no reason to think any is required. ... [¶] *It appears that a [private] school has a duty to provide supervision with respect to a particular activity if the school officials could reasonably anticipate that supervision was required* ...." (Annot., Tort Liability of Private Schools and Institutions of Higher Learning for Negligence of, or Lack of Supervision By, Teachers and Other Employees or Agents (1971) 38 A.L.R.3d 908, 916, fns. omitted; italics added.)

(18) "Where a student is injured in performing a task on the direction of school authorities without supervision, the question of [private] school negligence is one for the jury if there is evidence of the existence of a danger known to the school authorities, who neglect to guard the student against such danger, or if there is an unknown danger which

the school, by the exercise of ordinary care as a reasonably prudent person, would have discovered." (38 A.L.R.3d at p. 919, fn. omitted.) ***1462**

"Where the liability of the [private] school is sought to be predicated on alleged negligence of teachers or other employees or agents of the school, it is generally recognized that liability on the part of the school may be established under the doctrine of respondeat superior if negligence within the scope of their employment is shown." (38 A.L.R.3d at p. 912.)

In *Schultz v. Gould Academy* (Me. 1975) 332 A.2d 368, the Supreme Court of Maine held a private girls' school was liable for the negligence of its night watchman who failed to prevent a criminal assault on a 16-year-old girl student by an unknown intruder in a school dormitory. At about 3 a.m., the watchmen had observed footprints in fresh snow leading up to the building and on a roof adjacent to a screened but unlocked second story window. (*Id.*, at p. 369.) The watchman saw water on stairs leading to the basement; a stairwell also connected the basement to upper floors in the dorm. (*Ibid.*) Although the watchman investigated storage rooms in the basement, he did not alert anyone to the possibility that the intruder was on the upper floors where the attack occurred. (*Id.*, at pp. 369-370, fn. 3.)

The court held that the employee and the school had a duty to guard the students against dangers of which they had actual knowledge and those which they should reasonably anticipate. (332 A.2d at p. 371.) The court concluded that, "forewarned by furtive and intrusive movements in and around the girls' dormitory, a reasonably prudent man, charged with the protection of the dormitory's young female residents would have taken some measures to avert the likelihood that one (or more) of them would be physically harmed." (*Id.*, at p. 372.)

(7e) We think the foregoing authorities state the appropriate law to be applied in California. Under these authorities, if defendants here were in the private sector, they would be liable to plaintiff upon the facts pled in the first amended complaint. We therefore conclude that the defendant employees are similarly liable under section 820, and the District is liable under section 815.2 unless some other statute grants immunity from liability.

III *On demurrer, the District is not entitled to immunity.*

Defendants contend imposition of liability in such a situation would contravene section 845, which provides in relevant part that, "Neither a public entity nor a public employee is liable for failure to ... provide police protection service or ... for failure to provide sufficient police protection service." Defendants argue that imposing a duty on the District is tantamount to requiring them to have a police or security force. This contention ***1463** was persuasive below; the trial court granted the demurrer based in part on section 845.

(19) However, section 845 was designed to protect from judicial review in tort litigation the political and budgetary decisions of policymakers, who must determine whether to provide police officers or their functional equivalents. (*Lopez* v. *Southern Cal. Rapid Transit Dist., supra*, 40 Cal.3d at p. 792; *Taylor v. Buff* (1985) 172 Cal.App.3d 384, 391 [218 Cal.Rptr. 249].) (7f) Plaintiff's complaint does not plead that defendants should have provided police personnel or armed guards. There are measures short of the provision of police protection services, such as posting warning signs or closer supervision of students who frequent areas of known danger, that might suffice to meet the duty of reasonable care to protect students. (See *Lopez* v. *Southern Cal. Rapid Transit Dist., supra*, at pp. 787-788, 791-793.) We cannot assume as a matter of law, and without proof on the question, that defendants' duty could be satisfied only by the provision of a police protection service. (*Ibid.*)

The trial court erred when it sustained defendants' general demurrer to plaintiff's first amended complaint.

Disposition

The judgment is reversed.

Sparks, Acting P. J., and Watkins, J., [FN*] concurred. ***1464**

FN* Assigned by the Chairperson of the Judicial Council.

Cal.App.3.Dist.,1988.

Leger v. Stockton Unified School Dist.

END OF DOCUMENT

C

District Court of Appeal, Fifth District, California.
Charles PAUL, as Director of Agriculture of the State of California, Plaintiff and Respondent,
v.
Garian EGGMAN, Defendant and Appellant.
Civ. 566.

Aug. 23, 1966.
Hearing Denied Oct. 19, 1966.

Suit by the Director of Agriculture to enjoin defendant from certain activities alleged to be in violation of the Agricultural Code. From an order of the Superior Court, Tulare County, John Locke, J., the defendant appealed. The District Court of Appeal, McMurray, J. pro tem., held, inter alia, that the statute exempting sales by orange growers direct to consumers from standardization requirement when such sales are in nearby locations and not outside county of origin does not violate constitutional provisions that all laws of general nature shall have a uniform operation and that no special privileges or immunities shall be granted since county line limitation is reasonably related to preventing intra-state harmful marketing practices.

Affirmed.

Conley, P.J., dissented.

West Headnotes

[1] **Statutes** 188
361k188 Most Cited Cases
A court in interpreting a statute is not necessarily bound by strict dictionary definitions divorced from thrust and intent of statute under consideration.

[2] **Food** 14
178k14 Most Cited Cases
An orange grower who transported and sold oranges without ever complying with standardization requirements was not a "retailer" within exemption of statute since the exemption is directed to a retailer who has come into possession of oranges which have previously met the standardization requirements and which the retailer buys for resale to consumers. West's Ann.Agric.Code, § 796.2.

[3] **Statutes** 181(1)
361k181(1) Most Cited Cases
Statutes should be given a reasonable interpretation in accordance with apparent legislative intent which controls if it can be reasonably ascertained from the language used.

[4] **Food** 12
178k12 Most Cited Cases
Oranges grown in Tulare County and sold by grower in Santa Clara County were not "produced" in Santa Clara County so as to come within exemption from standard packing requirements of statute on theory that to produce means to bring forward, to bring or offer to view or notice, or to exhibit. West's Ann.Agric.Code, § 796.2.

[5] **Food** 1.5
178k1.5 Most Cited Cases
Statutory enactments relative to standard containers for foodstuffs are upheld as a proper exercise of the police power. West's Ann.Agric.Code, § § 784, 796.2.

[6] **Statutes** 71
361k71 Most Cited Cases
Under constitutional provision that all laws of general nature shall have a uniform operation, the classification must be reasonably related to purpose of the statute, and test of propriety of classification is the same under such provision or under provision prohibiting special privileges or immunities. West's Ann.Const. art. 1, § § 11, 21.

[7] **Food** 1.5
178k1.5 Most Cited Cases
(Formerly 178k1)
In view of facts that citrus industry in California is a large and complex one, that sales are made in great quantities, and that stability of market and of quality is essential, Legislature should have broad power in regulating the marketing production, processing and distribution of citrus products. West's Ann.Agric.Code, § § 784, 796.2.

[8] **Evidence** 5(2)
157k5(2) Most Cited Cases

In most places, and certainly in rural areas, the boundaries of a county are matters of common knowledge and are considered as being existing, familiar and well-known boundaries. West's Ann.Bus. & Prof.Code, § § 16601, 16602.

[9] **Constitutional Law** 205(3)
92k205(3) Most Cited Cases

[9] **Food** 1.5
178k1.5 Most Cited Cases

[9] **Statutes** 74(1)
361k74(1) Most Cited Cases
The statute exempting sales by orange growers direct to consumers from standardization requirement when such sales are in nearby locations and not outside county of origin does not violate constitutional provisions that all laws of general nature shall have a uniform operation and that no special privileges or immunities shall be granted since county line limitation is reasonably related to preventing intrastate harmful marketing practices. West's Ann.Agric.Code, § § 19.5, 784, 796.2; West's Ann.Const. art. 1, § § 11, 21.

[10] **Constitutional Law** 70.1(4)
92k70.1(4) Most Cited Cases
(Formerly 92k70(1))
While legislative declarations are not binding upon court, they are, as declarations of policy, entitled to great weight, and it is not duty of or prerogative of courts to interfere with legislative finding unless it clearly appears to be erroneous and without reasonable foundation.

[11] **Food** 5
178k5 Most Cited Cases
Fact that a retailer who purchases oranges from a standard pack then sees fit to market the oranges in some other container does not do away with necessity that oranges in first instance must meet quality and packaging standards. West's Ann.Agric.Code, § § 784, 796.2.

****238 *464** Morgan, Beauzay, Wylie, Ferrari & Leahy, by Philip L. Hammer, San Jose, for appellant.

Thomas C. Lynch, Atty. Gen., Walter S. Rountree, Asst. Atty. Gen., and Gerald L. Friedman, Deputy Atty. Gen., Sacramento, for respondent.

****239** OPINION

McMURRAY, Justice pro tem. [FN*]

FN* Assigned by the Chairman of the Judicial Council.

This is an appeal from an injunction enjoining appellant from certain activities alleged to be in violation of sections 784 and 796.2 of the Agricultural Code of the State of California. The appeal is based on an agreed statement of facts which appears as follows:

On April 13, 1965, the plaintiff, Charles Paul, as Director of Agriculture of the State of California, brought this action for civil penalties and injunctive relief against the defendant, Garlan Eggman, for violating chapter 2, division 5, of the Agricultural Code of California, and particularly, sections 784 and 796.2 thereof. An order to show cause and a temporary restraining order were issued on April 13, 1965, and thereafter on April 20, 1965, a hearing on the order to show cause on the preliminary injunction was held. After hearing oral argument and considering the documents filed by the opposing parties, the court below ordered a preliminary injunction against defendant. This injunction was filed with the court and personally served on the defendant. A timely notice of appeal was filed in the superior court and the matter is now before this court.

It appears that appellant owns a parcel of land in Terra Bella, Tulare County, consisting of approximately 18 acres of orange groves. In picking the oranges from his groves appellant places them in open citrus field picking boxes. For approximately the last ten years appellant has personally sold oranges from a location at 2425 Bascom Avenue, City of Campbell, County of Santa Clara. During this period, appellant has ***465** transported the oranges which he grows in Tulare County to this location in Santa Clara County. The oranges transported by appellant to this location are those which have been grown at his groves in Tulare County. The oranges are transported by truck in the open citrus field picking boxes. Upon arriving at the Bascom Avenue location appellant sells his oranges to the public. The oranges which appellant sells are taken from the open citrus field picking boxes and from grading bins, the latter being used for display purposes only. The oranges are sold in varying quantities. In March of 1965 the above course of conduct came to the attention of respondent Director through an official in his department and an Agricultural Commissioner of the County of Santa Clara.

Section 784 of the Agricultural Code of the State of

California provides as follows:

'It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter.'

At the time of the alleged offenses section 796.2 of the Agricultural Code of the State of California provided as follows:

'All oranges (except tangerines and mandarins), or lemons intended for shipment out of the State of California, before being so shipped, shall be packed in closed standard containers number 58, and shall be uniform in size. All grapefruit intended for shipment out of the State of California, before being so shipped, shall be packed in closed standard container number 59 and shall be uniform in size. All oranges (except tangerines and mandarins), or lemons offered for distribution or sale within the State of California, before being so offered, shall be packed in closed standard container number 58 or 60 and shall be uniform in size. All grapefruit offered for distribution or sale within the State of California, before being so offered, shall be packed in closed standard container number 59 or 61 and shall be uniform in size.

'The provisions of this section shall not apply to (1) the sale, marketing or transportation for sale or marketing of oranges, ****240** grapefruit or lemons for charitable purposes, unemployment relief or for use by the United States government or its agencies for relief distribution, or (2) the sale, marketing or transportation for sale or marketing of oranges, grapefruit or lemons in closed containers intended for sale to the consumer in their unbroken form and the net contents of which do not ***466** exceed 25 pounds, provided, however, that grapefruit when in bags and the net contents of each such bag does not exceed 25 pounds, shall be placed in closed standard container number 62, except each bag of grapefruit is exempt from this requirement when only one such bag is mailed, delivered, or sold directly to a consumer, or (3) the sale, marketing, or transportation for sale or marketing of oranges, grapefruit or lemons not in standard containers when transported directly from the State of California to the State of Baja California, Republic of Mexico, or (4) to oranges, grapefruit or lemons in a retail establishment in possession of a retailer for the purpose of resale directly to consumers; nor to oranges, grapefruit or lemons sold by a grower or packer regularly engaged in the growing or packing of these fruits directly to consumers on the premises where produced or packed or at a retail stand operated by such grower or packer near the point of production, which in no case shall be outside of the county in which the fruit was produced. As used in this section, 'consumer' means a person who buys oranges, grapefruit or lemons for use as a food and not for resale.

'Packed citrus fruit imported into this state from another state need not be packed in standard containers as specified in this code for such fruit if it is packed in containers conforming to the applicable laws or regulations of the state of origin or of the United States.' (Stats.1965, s 1, ch. 14, pp. 885-- 886.)

A subsequent amendment (Stats.1965, s 4, ch. 950, p. 2560) did not change those provisions which concern us.

The temporary restraining order and the preliminary injunction both forbade appellant from any further violation of these sections and specifically required him to conform to the provisions of section 796.2 of the Agricultural Code.

The issues as set forth by appellant are:

'1. Were the oranges, the sale of which was enjoined herein, 'in a retail establishment in possession of a retailer for the purpose of resale directly to consumers,' so as to bring this within the first clause of exception (4) of section 796.2 of the Agricultural Code of the State of California?'

'2. Were the oranges, the sale of which was enjoined herein, 'sold by a grower or packer regularly engaged in the growing or packing of these fruits directly to consumers on the premises where produced or packed,' so as to bring the case within the exception in the second clause of exception (4) of section 796.2 of the Agricultural Code of the State of California?'

***467** '3. Is section 796.2 of the Agricultural Code of the State of California unconstitutional under article I, section 11 of the California Constitution which provides that all laws of a general nature shall have a uniform operation?'

'4. Is section 796.2 of the Agricultural Code of the State of California invalid under article 1, section 21 of the California Constitution in that it grants to citizens, or classes of citizens, privileges or immunities which, upon the same terms, are not granted to all citizens?'

The appurtenant provisions of the Agricultural Code

are aimed at standardizing citrus marketing practices and provide standards for packing, shipping and processing of oranges and other citrus fruits. With two exceptions not relevant here, the original legislation (Stats.1941, s 2, ch. 1197, p. 2969) provided that only those oranges shipped out of state had to be of uniform size and of standard pack, the Legislature expressing its intention in the following **241 language found in Statutes of 1941, section 1, chapter 1197, pages 2968--2969:

'It is hereby found and declared that the citrus industry of California is a permanent industry upon which the prosperity of the State in a large measure depends; that the citrus industry is now, and has for several years been, threatened with severe losses because of low prices received for fruit in markets outside of the State of California and resulting low returns to producers; that unless such conditions are remedied recurring losses in the future are likely to occur; that the effect thereof is to seriously imperil the citrus industry; that such low prices are in part caused by demoralization of out-of-state markets through the use in the marketing and shipment of citrus fruits from California of deceptive packs and packing containers; that the packing of oranges, lemons or grapefruit in loose or 'jumbo' packed containers, unlidded, permits the filling of an otherwise standard package with a deceptively small quantity of irregularly sized fruit as compared to the standard package in competition with which it is sold; that these conditions are not so prevalent in markets within the State of California because transportation conditions are such as to cause the greater portion of the fruits sold in such markets to be in loose form; that certain small consumer packages designed for sale in unbroken packages to the consumer do not have at this time these same deceptive or demoralizing tendencies.'

[1][2] In 1961 the amendment to section 796.2 of the Agricultural Code extended coverage to shipments within the state, presumably because the Legislature had determined that *468 marketing practices within the state had degenerated to a point where similar standardization was necessary to protect the industry. (Stats.1961, s 2, ch. 658, p. 1871.) Appellant seeks to avail himself of the first exception stated in clause (4) of section 796.2 which provides that the standardization regulations do not apply to oranges in a retail establishment in possession of a retailer for the purpose of resale directly to consumers. In advancing this argument appellant urges that he is a retailer and as authority therefor cites dictionary definitions which certainly would support his position that he is a retail merchant or dealer. The respondent, however, also cites dictionary definitions to contest the position of appellant and it appears to us that a court in interpreting a statute is not necessarily bound by strict dictionary definitions divorced from the thrust and intent of the statute under consideration. A full and fair reading of this statute is persuasive that the appellant here is not a retailer within the meaning of the exemption set forth in clause (4) because that section is directed to a retailer who has come into possession of oranges which have previously met the standardization requirements and which the retailer buys for resale to consumers. That is not the case here. These are oranges produced by the grower which have been transported and sold without ever complying with the standardization requirements.

[3][4] The next argument advanced by appellant is one to the effect that the oranges here in question were in fact 'produced' in Santa Clara County where they were sold, instead of in Tulare County where they were grown, citing for authority a dictionary definition which includes a definition that to produce means to bring forward, to bring or offer to view or notice, to exhibit. What has been said above also applies to this contention of appellant which, when viewed in relation to the statute in which it appears, is very nearly quibbling. It must be remembered, as said in County of Alameda v. Kuchel, 32 Cal.2d 193, 199, 195 P.2d 17, 20:

'It is a cardinal rule that statutes should be given a reasonable interpretation and in accordance with the apparent purpose and intention of the law makers. Such intention controls if it can be reasonably ascertained from the language used.'

Viewing appellant's activities in the light of the language in section 796.2 and considering **242 these two arguments, the appellant cannot come within the exemption from the standard packing requirements of that section.

Appellant's next two contentions as set forth in his statement *469 of issues numbered 3 and 4 above present a more difficult problem. These contentions are so similar to one another that they can be treated as one. The questions seem to resolve into a problem of classification, which can be stated as follows: When sales from orange growers direct to consumers are exempted from standardization requirements, may the Legislature constitutionally restrict such sales to nearby locations, prohibiting such sales outside the county of origin? The consideration of this question requires viewing of Article I, section 11,

of the California Constitution, which provides: 'All laws of a general nature shall have a uniform operation,' and a consideration of article I, section 21, of the California Constitution, which provides: 'No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.'

[5] Statutory enactments relative to standard containers for foodstuffs are upheld as a proper exercise of the police power. (See Pacific States Box & Basket Co. v. White, 296 U.S. 176, 181, 56 S.Ct. 159, 161, 80 L.Ed. 138; In re Fujii, 189 Cal. 55, 58--59, 207 P. 537; see also In re Hayes, 134 Cal.App. 312, 25 P.2d 230; Detweiler v. Welch, 9 Cir., 46 F.2d 75, 73 A.L.R. 1440.) And it would appear that this statute in the Fruit, Nut and Vegetable Standards Act insofar as it imposes standard container requirements, is a proper exercise of the police power. The question, however, still remains as to whether or not the exception for sales by a grower near his farm but not outside the county where the oranges are grown is a reasonable classification under that police power. In Sawyer v. Barbour, 142 Cal.App.2d 827, 838, 300 P.2d 187, 193, it is said:

> 'The provisions of the Constitution requiring all laws of a general nature to have uniform operation, prohibiting the granting of special privileges and immunities, prohibiting the enactment of special laws in particular cases, do not prevent classification by the Legislature or require that statutes operate uniformly with respect to persons who are in fact different. (Citation.) A statute meets the constitutional requirements if it relates to and operates uniformly on the whole of a single class properly selected.'

[6] The classification must be reasonably related to the purpose of the statute. (County of Los Angeles v. Superior Court, 62 Cal.2d 839, 846, 44 Cal.Rptr. 796, 402 P.2d 868.) The test of the propriety of the classification seems to be the ***470** same either under article I, section 11, or article I, section 21. (Professional Fire Fighters, Inc. 289, 32 Cal.Rptr. 830, 384 P.2d 158; County 32 Cal.Rptr. 830, 834 P.2d 158; County of Los Angeles v. Superior Court, supra; see also Dept. of Mental Hygiene v. Kirchner, 62 Cal.2d 586, 43 Cal.Rptr. 329, 400 P.2d 321; People v. Western Fruit Growers, 22 Cal.2d 494, 140 P.2d 13.) In the last cited case it is said at pages 506--507, 140 P.2d at page 20:

> 'Problems of classification under the California constitution are thus similar to those presented by the federal equal protection of the laws clause of the 14th Amendment. Under either provision, the mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition. The discrimination or inequality produced, in order to conflict with the constitutional provisions, must be 'actually and palpably unreasonable and arbitrary', or the legislative determination as to what is a sufficient distinction to warrant the classification will not be overthrown. (Citations.) When a legislative classification ****243** is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification.'

[7] In the instant case no evidence was introduced at the hearing on the preliminary injunction as to the harmful or non-harmful effects of the marketing practices which were followed by the appellant here, and the respondent, although arguing that the legislative purpose is to prevent harmful practices, nowhere indicates what is harmful about a farmer shipping his oranges in bulk to another county and selling them there. When it is remembered, however, that the citrus industry in California is a large and complex one, and that sales are made in great quantities, and that stability of market and of quality is essential, it appears that the Legislature should have broad power in regulating the marketing production, processing and distribution of the citrus products.

[8][9] The exemptions allowed to a farmer selling his product at nearby locations and in any event not outside the county where the citrus is grown, does not appear to be an unreasonable limitation, but seems to stem from a feeling of sympathy on the part of the Legislature with the grower who wishes to engage in a limited marketing of his products. To allow extension of a farmer's sales all over the State of California without any limitation as to territorial extent might ***471** result in a chaotic condition of the market wherein the standardization provisions which seem to be set forth with great specificity would fail because of the uncontrolled marketing of ungraded and unstandardized products. To contend that the restriction of the marketing to a county is an unreasonable classification is to overlook the fact that in most places, and certainly in rural areas, the boundaries of a county are matters of common knowledge and are considered as being existing,

familiar, and well-known boundaries. The recognition of such territorial limitations is not unique in this legislation. (See, e.g., Bus. & Prof.Code, ss 16601, 16602.) A fair reading of the statute persuades us that the legislature considered the sales made in areas adjoining the farmer's land and within the county where his product is grown would be of not too substantial a character. However, to allow him to extend this uncontrolled marketing of citrus products could affect the otherwise regulated market, and thus it appears that the county line limitation is reasonably related to preventing intra-state harmful marketing practices. Even classification on the basis of an attempt to equalize competition may be a valid aim within the police power. (See Knudsen Creamery Co. of California v. Brock, 37 Cal.2d 485, 493--495, 234 P.2d 26.)

In interpreting the Legislature's intent in this matter, some weight has been given to the declarations contained in section 19.5 of the Agricultural Code of the State of California, where it provides:

> 'It is hereby declared, as a matter of legislative determination, that the provisions of this code are enacted in the exercise of the power of this State for the purposes of promoting and protecting the agricultural industry of the State and for the protection of the public health, safety and welfare. In all civil actions the provisions of this code shall be liberally construed for the accomplishment of these purposes and for the accomplishment of the purposes of the several divisions of this code, * * *'

[10] The legislative expression in the 1941 Act, supra, that the standardization proceedings were not deemed to be required within the State of California must also be given some weight. As has been noted heretofore, by extending these provisions to transactions within the State of California, the Legislature must have found that practices were appearing within the state which required the extension of these standardization provisions. While it is true that legislative declarations are not binding upon this court, they are, as declarations of ****244** policy, 'entitled to great weight and it is not the duty or ***472** prerogative of the courts to interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable foundation.' (Housing Authority of Los Angeles County v. Dockweiler, 14 Cal.2d 437, 449--450, 94 P.2d 794, 801.)

From a reading of the declaration set forth in the above section of the Agricultural Code, it appears that as well as promoting and protecting the agricultural industry of the state, the provisions of the code are enacted in the exercise of the power of the state for the purpose of also protecting the public health, safety and welfare of the people of this state. By requiring standardization in grading and packing of citrus fruits, the consuming public is protected from unprincipled people who offer for sale substandard fruit in off sizes and without any regard as to its quality.

The exception granted to the local grower to sell his fruit at a roadside stand is a privilege to him, allowing him to sell at a place close to his home where, if the quality of the produce he offers and purveys to the public is substandard, many of his consumers who are also his neighbors would in all probability evidence any dissatisfaction with the quality of his produce by failing to deal with him again, thereby imposing an economic sanction which in and of itself would require him to offer acceptable products at his establishment.

The same pressure would not be present upon a grower who is acting as a retailer at a location far distant from his home or chief base of operation. In that event the grower-retailer is in the position of marketing bulk oranges without regard to any quality standard or packaging standard, and the consuming public might well be victimized by inferior produce, the seller not being subject to any community pressure to furnish produce of any particular quality.

[11] The fact that a retailer purchases oranges from a standard pack and then sees fit to market the oranges in some other container does not do away with the necessity that the oranges in the first instance must meet quality and packaging standards.

The classification here appears to be reasonable and fair. It reflects an implicit determination that local unrestricted sales by farmers do not cause harmful effects on the citrus market, but that statewide sales would. The rule as to the judgment of the fairness of classification is well stated in Fraenkel v. Bank of America, 40 Cal.2d 845, 849, 256 P.2d 569, 571, where it is said:

> 'All presumptions favor the legislative classification, which cannot be overturned unless plainly arbitrary. (Citations.) If the Legislature could have ***473** acted upon any conceivably reasonable ground, the courts must assume that the Legislature acted upon such basis. 'In short, the Legislature's judgment 'on the question whether or not a particular provision shall be made for any

> class of cases, and as to the classification thereof, is not to be interfered with, except for very grave causes, and where it is clear beyond reasonable doubt that no sound reason for the legislative classification, and for the different provisions regarding the same, exists."

It is apparent that the Legislature is far better equipped to survey the methods of production distribution, processing and sale of citrus products than are the courts, and in the absence of an affirmative showing that there was a clear violation of the reasonableness of classification, the order must be and it is affirmed.

STONE, J., concurs.

CONLEY, P.J., dissents.

Hearing denied; MOSK, J., dissenting.

244 Cal.App.2d 461, 53 Cal.Rptr. 237

END OF DOCUMENT

Supreme Court of California
Kathleen PETERSON, Plaintiff and Appellant,
v.
SAN FRANCISCO COMMUNITY COLLEGE DISTRICT, et al., Defendants and Respondents.
S.F. 24587.

Sept. 6, 1984.

College student who was attacked on stairway by man who had been hiding in foliage brought action against college district and others. The Superior Court, San Francisco County, Ira A. Brown, J., dismissed and student appealed. The Supreme Court, Broussard, J., held that: (1) community college district had a duty to exercise foreseeable care to protect students from reasonably foreseeable assaults on campus; (2) district was immune from liability for failure to provide adequate police protection; (3) district could be held liable for failing to warn students of known dangers or failing to trim the foliage around the parking lot and stairway where the assaults occurred; and (4) plaintiff stated a cause of action under provisions of the Tort Claims Act.

Reversed.

Opinion 141 Cal.App.3d 456, 190 Cal.Rptr. 335 vacated.

West Headnotes

[1] Pleading 214(2)
302k214(2) Most Cited Cases
General demurrer admits the truthfulness of the properly pleaded factual allegations of the complaint.

[2] Negligence 220
272k220 Most Cited Cases
(Formerly 272k2)

[2] Negligence 221
272k221 Most Cited Cases
(Formerly 272k2)
As a general rule, one has no duty to control the conduct of another and no duty to warn those who may be endangered by such conduct.

[3] Negligence 220
272k220 Most Cited Cases
(Formerly 272k2)
Duty may arise where a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or where a special relationship exists between the actor and the other which gives the other a right to protection.

[4] Negligence 1161
272k1161 Most Cited Cases
(Formerly 272k50)
Liability will normally be imposed in circumstances where the possessor of land has reasonable cause to anticipate the misconduct of third persons.

[5] Colleges and Universities 5
81k5 Most Cited Cases
Enrolled student using parking lot at college in exchange for fee was an invitee to whom the possessor of the premises would ordinarily owe a duty of due care if a private owner.

[6] States 112.2(1)
360k112.2(1) Most Cited Cases
Public entity liability for negligence is statutory in nature. West's Ann.Cal.Gov.Code § 815.

[7] States 112(2)
360k112(2) Most Cited Cases
Provisions of the Tort Claims Act are to be read against the background of general tort law. West's Ann.Cal.Gov.Code § 815.

[8] Negligence 1242
272k1242 Most Cited Cases
(Formerly 272k62(1))
Negligent or unlawful conduct of a third party does not preclude a finding that the property was in a dangerous condition when used with due care by the plaintiff.

[9] States 112.2(2)
360k112.2(2) Most Cited Cases
Nothing in the provisions of the Tort Claims Act making public entities liable for injury caused by dangerous condition of its property precludes a finding that a public entity is under a duty, given

special circumstances, to protect harmful criminal conduct on its property. West's Ann.Cal.Gov.Code § 835.

[10] **Colleges and Universities** 5
81k5 Most Cited Cases
Intervening criminal conduct could not absolve college district from liability for injuries to student where the student alleged that college district maintained the property in such a way as to increase the risk of criminal activity. West's Ann.Cal.Gov.Code § 835.

[11] **Colleges and Universities** 5
81k5 Most Cited Cases
Student who alleged that college parking lot and adjacent stairway was in "dangerous condition" because thick and untrimmed foliage and trees around the parking lot and stairway permitted assailant to perpetrate his crime against her, that college district was aware of the condition and failed to take reasonable protective measures, including trimming the foliage or warning her of the danger, and that the district's inaction created a reasonable and foreseeable risk that she and others using the stairway would be injured stated a cause of action against the college district for the "dangerous condition" of its property. West's Ann.Cal.Gov.Code § 835.

[12] **Colleges and Universities** 5
81k5 Most Cited Cases
In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, and where they spend a significant portion of their time and may, in fact, live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime.

[13] **Colleges and Universities** 5
81k5 Most Cited Cases
College district could not be held liable to student for any failure to provide adequate police protection. West's Ann.Cal.Gov.Code § 845.

[14] **Colleges and Universities** 5
81k5 Most Cited Cases
Student was entitled to prove that failure of college to warn of attacks which had occurred near parking lot, failure of college to trim foliage growing around parking lot and adjacent stairway, and failure of college to take other reasonable measures to protect student was proximate cause of student's injuries when she was attacked on the stairway by man who had been hiding in the foliage.

***843 *803 **1194** John J. Conneely, John D. O'Connor, Thomas M. Peterson and Brobeck, Phleger & Harrison, San Francisco, for plaintiff and appellant.

Leo J. O'Brien, Lawrence A. Margoles and Barfield, Barfield, Dryden & Ruane, San Francisco, for defendants and respondents.

John K. Van de Kamp, Atty. Gen., Marvin Goldsmith, Asst. Atty. Gen., Seward L. Andrews and Bruce J. Braverman, Deputy *804 Attys. Gen., as amici curiae for defendants and respondents.

BROUSSARD, Justice.

This case presents the question whether a community college district and its agents have a duty to exercise due care to protect students from reasonably foreseeable assaults on the campus. We conclude that the district does owe such a duty to its students. As we shall explain, we also conclude that while the district is immune from liability for failure to provide adequate police protection, it is not immune for **1195 failure to warn its students of known dangers posed by criminals on the campus.

***844** Plaintiff Kathleen Peterson brought this action for damages under California's Tort Claims Act (Gov.Code, § 810 et seq.) [FN1] against the San Francisco Community College District, a state agency, and its agents. The plaintiff, a student, sustained injuries as a result of an attempted daylight rape in the parking lot area of the City College of San Francisco campus. The trial court sustained defendants' demurrer to plaintiff's first amended complaint without leave to amend and entered a judgment of dismissal. [FN2]

FN1. All further statutory references are to the Government Code unless specified otherwise.

FN2. Defendants demurred on the grounds that the complaint failed to state a cause of action. In its memorandum of points and authorities defendant also asserted immunity under section 845 (public entity not liable for "failure to establish a police department or otherwise provide police protection service or, if police protection service is

provided, for failure to provide sufficient police protection service").

The complaint consists of two causes of action. In the first cause of action plaintiff alleges that by virtue of a special relationship between the defendant district and herself, the defendants had a duty to protect her and/or to warn her of danger. In her second cause of action plaintiff alleges that defendants are liable under section 835 for maintaining a dangerous condition of property which together with the criminal act of a third party caused her injuries.

FACTS

[1] A general demurrer admits the truthfulness of the properly pleaded factual allegations of the complaint. (*White v. Davis* (1975) 13 Cal.3d 757, 765, 120 Cal.Rptr. 94, 533 P.2d 222.) The facts as alleged in plaintiff's first amended complaint are as follows:

***805** On April 25, 1978, plaintiff, a student at City College of San Francisco, was assaulted while ascending a stairway in the school's parking lot. An unidentified male jumped from behind "unreasonably thick and untrimmed foliage and trees" which adjoined the stairway and attempted to rape her. The assailant used a modus operandi which was similar to that used in previous attacks on the same stairway. The defendants were aware that other assaults of a similar nature had occurred in that area and had taken steps to protect students who used the parking lot and stairway. Plaintiff relied upon this increased protection.

Plaintiff had been issued a parking permit by the college in return for a fee. Defendants did not publicize the prior incidents or in any way warn the plaintiff that she was in danger of being attacked in that area of campus. Plaintiff sustained physical and emotional injuries and economic loss as a result of the assault.

Although plaintiff has chosen to proceed under two different theories, the primary question before us is whether under the facts as alleged the defendants owed her a duty of care. The question then becomes whether this duty is affected by the fact that the defendants here are a public entity and its agents. Accordingly, we proceed to consider the nature of the relationship between plaintiff and defendants and the duty, if any, which the defendants owed her.

DUTY

Plaintiff alleges that the following circumstances placed upon the defendants an affirmative duty to exercise due care for her protection: "Having invited [her] onto the campus property, having enrolled her as a student, having issued to [her] a permit to park and use the parking lot and stairway in question in exchange for ... payment of a fee, having undertaken to patrol the parking lot and stairway in question in the light of the prior incidents of violence in the area, and having induced [her] to rely and depend upon this protection, a special relationship existed between Plaintiff and Defendants pursuant to which Defendants were obliged to take reasonable protective measures to ensure Plaintiff's ****1196** safety against violent attacks and otherwise protect her from foreseeable *****845** criminal conduct and/or to warn her as to the location of prior violent assaults in the vicinity of the subject parking lot and stairway."

We have observed that the question of a duty " '... is a shorthand statement of a conclusion, rather than an aid to analysis in itself ... [b]ut it should be recognized that "duty" is not sacrosanct in itself, but only an ***806** expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.' " (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734, 69 Cal.Rptr. 72, 441 P.2d 912, quoting with approval Prosser, Law of Torts (3d ed.) at pp. 332-333.) In considering whether one owes another a duty of care, several factors must be weighed including among others: " '[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]' (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113, 70 Cal.Rptr. 97, 443 P.2d 561; [citations].) When public agencies are involved, additional elements include 'the extent of [the agency's] powers, the role imposed upon it by law and the limitations imposed upon it by budget; ...' (*Raymond v. Paradise Unified School Dist.* (1963) 218 Cal.App.2d 1, 8 [31 Cal.Rptr. 847]; see *Smith v. Alameda County Social Services Agency* [1979] 90 Cal.App.3d 929 [153 Cal.Rptr. 712].)" (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 750, 167 Cal.Rptr. 70, 614 P.2d 728.)

[2][3] As a general rule one has no duty to control

the conduct of another, and no duty to warn those who may be endangered by such conduct. (Rest.2d Torts, § 315; *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 203, 185 Cal.Rptr. 252, 649 P.2d 894; *Thompson v. County of Alameda, supra,* 27 Cal.3d 741, 751, 167 Cal.Rptr. 70, 614 P.2d 728; *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 435, 131 Cal.Rptr. 14, 551 P.2d 334.) A duty may arise, however, where "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection." (Rest.2d Torts, § 315; *Davidson v. City of Westminster,* supra, 32 Cal.3d at p. 203, 185 Cal.Rptr. 252, 649 P.2d 894; *Thompson v. County of Alameda, supra,* 27 Cal.3d at pp. 751-752, 167 Cal.Rptr. 70, 614 P.2d 728; *Tarasoff v. Regents of University of California, supra,* 17 Cal.3d at p. 435, 131 Cal.Rptr. 14, 551 P.2d 334.) Among the commonly recognized special relationships are that between a common carrier and its passengers, that between an innkeeper and his or her guests, and that between a possessor of land and members of the public who enter in response to the landowner's invitation. (Rest.2d Torts, § 314A.) [FN3]

FN3. We have also observed that in some instances the relationship of a school district to its students gives rise to a duty of care. In *Dailey v. Los Angeles Unified School District* (1970) 2 Cal.3d 741, 87 Cal.Rptr. 376, 470 P.2d 360, we stated: "While school districts and their employees have never been considered insurers of the physical safety of students, California law has long imposed on school authorities a duty to 'supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection. [Citations.]' (*Taylor v. Oakland Scavenger Co.* (1941) 17 Cal.2d 594, 600 [110 P.2d 1044]; Ed.Code, § 13557.) [Citations.] The standard of care imposed upon school personnel in carrying out this duty to supervise is identical to that required in the performance of their other duties. This uniform standard to which they are held is that degree of care 'which a person of ordinary prudence, charged with [comparable] duties, would exercise under the same circumstances.' [Citations.] Either a total lack of supervision [citation] or ineffective supervision [citation] may constitute a lack of ordinary care on the part of those responsible for student supervision...." (*Id.,* at p. 747, 87 Cal.Rptr. 376, 470 P.2d 360.)
Dailey arose in the context of a secondary school where a 16-year-old was killed while engaging in a "slap boxing match." We observed that children of that age "should not be expected to exhibit that degree of discretion, judgment, and concern for the safety of themselves and others which we associate with full maturity." (*Id.,* at p. 748, 87 Cal.Rptr. 376, 470 P.2d 360.) The present case, by contrast, does not implicate the duty to supervise the activities of students who are too immature to exercise judgment for their personal safety. Rather, the issue here is the extent of the school's duty to provide safe premises.

***807 ***846** [4] ****1197** There is no question that if the defendant district here were a private landowner operating a parking lot on its premises it would owe plaintiff a duty to exercise due care for her protection. (See Civ.Code, § 1714; [FN4] *Gomez v. Ticor* (1983) 145 Cal.App.3d 622, 628, 193 Cal.Rptr. 600 [parking lot is " 'an especial temptation and opportunity for criminal misconduct' "; where prior acts of theft and vandalism alleged, defendant owed patrons duty of care].) It has long been recognized that "a possessor of land who holds it open to the public for entry for business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent or intentionally harmful acts of third persons ... and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it." (Rest.2d Torts, § 344; *Slater v. Alpha Beta Acme Markets, Inc.* (1975) 44 Cal.App.3d 274, 278, 118 Cal.Rptr. 561; 4 Witkin, Summary of Cal.Law (8th ed. 1974) Torts, § 596, p. 2867.) Liability will normally be imposed in circumstances where the possessor has reasonable cause to anticipate the misconduct of third persons. (See *Rogers v. Jones* (1976) 56 Cal.App.3d 346, 356, 128 Cal.Rptr. 404; 4 Witkin, Summary of Cal.Law (8th ed., 1982 supp.) Torts, § 596, p. 302.)

FN4. Civil Code section 1714 provides in relevant part: "(a) Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the

> management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself...."

Of particular relevance to our discussion of the defendants' duty is *Campodonico v. State Auto Parks Inc.* (1970) 10 Cal.App.3d 803, 89 Cal.Rptr. 270. In *Campodonico,* plaintiff alleged that a parking lot was constructed ***808** and maintained so as to encourage the presence of persons of degenerate tendencies, and that as a proximate result of defendant's negligence plaintiff was assaulted. The court noted at the outset: "Defendant admits that plaintiff was lawfully upon the premises and that a legal duty was owed to her. The nature of that duty has been clarified, simplified, and stated succinctly ... in ... *Rowland v. Christian,* 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561, as follows: 'It bears repetition that the basic policy of this state set forth by the Legislature in section 1714 of the Civil Code is that everyone is responsible for an injury caused to another by his want of ordinary care or skill in the management of his property.... The proper test to be applied to the liability of the possessor of land in accordance with section 1714 of the Civil Code is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others ....' " (*Campodonico, supra,* 10 Cal.App.3d at pp. 805-806, 89 Cal.Rptr. 270, quoting with approval *Rowland v. Christian* (1968) 69 Cal.2d 108, 118-119, 70 Cal.Rptr. 97, 443 P.2d 561, fn. omitted.)

The court further noted that the fact that plaintiff's injuries were caused by a third party would not absolve the defendant of liability: "The concept of intervening causation is inapplicable here; the cause of action is based upon the assumption that an act by a third party caused plaintiff's injuries and is addressed to the issue of whether defendant had a duty to prevent such an act. 'If the realizable likelihood that a third person may act in a ****1198** particular manner is the hazard or one of *****847** the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.' (Rest., Torts, § 449, quoted with approval in *Conner v. Great Western Sav. & Loan Assn.* [1968] 69 Cal.2d 850, 869 [73 Cal.Rptr. 369, 447 P.2d 609]; *Richardson v. Ham* [1955] 44 Cal.2d 772, 777 [285 P.2d 269]; *Wallace v. Der-Ohanian* [1962] 199 Cal.App.2d 141, 144, 18 Cal.Rptr. 892 and *Hession v. City & County of San Francisco* [1954] 122 Cal.App.2d 592, 603 [265 P.2d 542]; see also Rest.2d Torts, § § 449 and 447, com. a.)" (*Campodonico, supra,* 10 Cal.App.3d at p. 808, 89 Cal.Rptr. 270.)

[5] Under the circumstances of this case, plaintiff, an enrolled student using the parking lot in exchange for a fee, was an invitee [FN5] to whom the ***809** possessor of the premises would ordinarily owe a duty of due care. [FN6] (See, e.g., *Taylor v. Centennial Bowl Inc.* (1966) 65 Cal.2d 114, 52 Cal.Rptr. 561, 416 P.2d 793 [bowling alley proprietor owed duty to patron to protect her from assault in parking lot]; *Dillon v. Wallace* (1957) 148 Cal.App.2d 447, 451, 306 P.2d 1044 [where business invitor knows about course of conduct of third party which could be dangerous to invitees, duty to forestall such conduct]; *Winn v. Holmes* (1956) 143 Cal.App.2d 501, 299 P.2d 994 [duty to protect restaurant patron from injury by third party].) As previously noted, a private owner under similar circumstances would owe the persons using the premises a duty of care. The question remains whether the provisions of the Tort Claims Act preclude the imposition of such a duty on the defendants under the circumstances of this case.

> FN5. As explained in *Rowland, supra,* 69 Cal.2d at page 119, 70 Cal.Rptr. 97, 443 P.2d 561, although we no longer adhere to the rigid classifications of duty based on status, plaintiff's status is relevant under certain circumstances to the question of liability. (See also *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 25, 77 Cal.Rptr. 914.)

> FN6. The characterization of students as invitees is not a novel proposition. In *Vreeland v. State of Arizona Board of Regents* (Ariz.1969) 9 Ariz.App. 61, 449 P.2d 78, *Jesik v. Maricopa County Community College District* (1980) 125 Ariz. 543, 611 P.2d 547 and *Relyea v. State* (Fla.App.1980) 385 So.2d 1378, students were characterized as invitees to whom a duty was owed to make the premises reasonably safe. In both *Jesik* and *Relyea* the danger to the students arose because of criminal conduct by a third party.

THE TORT CLAIMS ACT

[6][7] Turning to the Torts Claims Act, we note initially that public entity liability is statutory in nature. (§ 815.) [FN7] Its provisions, however, are to be read against the background of general tort law. "The conceptual theory of statutory liability under the

act is keyed to the common law of negligence and damages...." (Van Alstyne, Cal. Government Tort Liability Practice (Cont.Ed.Bar 1980) § 2.7, pp. 36-37; see *Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 831, 87 Cal.Rptr. 173 ["[t]he exclusive sway of statutory rules does not foreclose the aid of common law tort doctrines and analogies in ascertaining and achieving imperfectly expressed statutory objectives"].)

> FN7. Section 815 provides in relevant part: "Except as otherwise provided by statute: [#] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."

Section 835 is the principal provision addressing the circumstances under which the government may be held liable for maintaining a dangerous condition of public property. It provides in relevant part: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

***810** "(a) A negligent or wrongful act or omission of an employee of the public entity ***848 **1199** within the scope of his employment created the dangerous condition; or

[8] "(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." Section 830 defines a "dangerous condition" as: "... a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." [FN8]

> FN8. An issue raised but not vigorously pursued by defendants is that the illegality of the assailant's conduct in this case negates any finding that the property was dangerous when used with "due care." Such a contention was rejected by the Court of Appeal in *Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 198 Cal.Rptr. 208, where it was held that the negligent or unlawful conduct of a third party does not preclude a finding that the property was in a dangerous condition when used with due care by the plaintiff.

In general, "[w]hether a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may only be resolved as a question of law if reasonable minds can come to but one conclusion." (*Bakity v. County of Riverside* (1970) 12 Cal.App.3d 24, 30, 90 Cal.Rptr. 541; *Buchanan v. City of Newport Beach* (1975) 50 Cal.App.3d 221, 228, 123 Cal.Rptr. 338.) [FN9]

> FN9. Defendants argue that the question is to be resolved as a matter of law. This proposition is the exception rather than the rule. Defendants rely upon *Jones v. Czapkay* (1960) 182 Cal.App.2d 192, 6 Cal.Rptr. 182, a case which presented a unique set of factual allegations and was decided before the 1963 enactment of the California Tort Claims Act. *Jones* was an action for injuries sustained as a result of the plaintiff's exposure to a person with tuberculosis. The action was brought under the Public Liability Act (former § 53051--liability for dangerous or defective condition). Cases decided under the act state that "[t]he scope of the Public Liability Act is a question of law to be determined by the court." (*Bryant v. County of Monterey* (1954) 125 Cal.App.2d 470, 473, 270 P.2d 897; *Campbell v. City of Santa Monica* (1942) 51 Cal.App.2d 626, 629, 125 P.2d 561.)
> Section 830.2 now sets forth the criteria for a court to conclude as a matter of law that a condition is not dangerous within the meaning of section 830: "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." (§ 830.2.)

[9] The majority of cases which have construed these

provisions have concluded that third party conduct by itself, unrelated to the condition of the property, does not constitute a "dangerous condition" for which a public entity may be held liable. (See, e.g., ***811** *Hayes v. State of California* (1974) 11 Cal.3d 469, 113 Cal.Rptr. 599, 521 P.2d 855; *Stone v. State of California* (1980) 106 Cal.App.3d 924, 165 Cal.Rptr. 339; *Moncur v. City of Los Angeles* (1977) 68 Cal.App.3d 118, 137 Cal.Rptr. 239; *Seybert v. County of Imperial* (1958) 162 Cal.App.2d 209, 327 P.2d 560; see also *Bartell v. Palos Verdes Peninsula School District* (1978) 83 Cal.App.3d 492, 147 Cal.Rptr. 898; *Slapin v. Los Angeles International Airport* (1976) 65 Cal.App.3d 484, 135 Cal.Rptr. 296.) The cases so holding have relied primarily on policy considerations and the definition of dangerous condition as a "condition of *property*" for the conclusion that a defect in property is necessary in order to state a cause of action based on the wrongful conduct of third parties. Nothing in the provisions of section 835, however, specifically precludes a finding that a public entity may be under a duty, given special circumstances, to protect against harmful criminal conduct on its property. [FN10]

> FN10. Cases have recognized, for example, that a public entity may be liable for permitting dangerous but not necessarily criminal conduct to occur on its property. (See *Swaner v. City of Santa Monica, supra,* 150 Cal.App.3d 789, 198 Cal.Rptr. 208 [liability for permitting vehicles to race on beach]; *Hill v. People* (1979) 91 Cal.App.3d 426, 154 Cal.Rptr. 142 [liability for permitting oversized truck to use overpass]; *Quelvog v. Long Beach* (1970) 6 Cal.App.3d 584, 86 Cal.Rptr. 127 [liability for permitting autoettes to be driven on sidewalks]; *Bauman v. San Francisco* (1940) 42 Cal.App.2d 144, 108 P.2d 989 [liability for allowing baseball to be played in close proximity to sandbox where there were small children].)

***849 **1200** In *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 159 Cal.Rptr. 835, 602 P.2d 755, this court rejected the contention that a public entity is under no duty to safeguard its property if the property is not inherently dangerous or defective. The plaintiffs in *Ducey* sued for injuries sustained when another car crossed the freeway median and collided with their car. Plaintiffs presented evidence demonstrating that there had been many cross-median accidents on the section of the highway where the accident had occurred, and that a protective barrier might have prevented the injuries sustained. In *Ducey* the state argued that it could not be held liable for damage which occurred not as a result of a physical defect such as a pothole or a crack in a highway but as a result of the absence of a protective device. We concluded, however, that a public entity could be held liable for a dangerous condition of which it had actual or constructive notice and for which it had failed to provide adequate safeguards, stating that "... section 835 specifically provides that when a public entity has actual or constructive notice of a dangerous condition, the entity's liability may be predicated on its failure to take protective measures to safeguard the public from dangers that may not necessarily be of the entity's own creation .... Thus the language of the applicable statutes refutes the state's argument that it is under no 'duty' to protect the public against dangers that are not created by physical defects in public property." (*Ducey, supra,* at pp. 716- 717, 159 Cal.Rptr. 835, 602 P.2d 755.)

***812** [10] It is also clear that intervening criminal conduct cannot absolve the defendant of liability where as here the plaintiff alleges that defendants maintained the property in such a way so as to increase the risk of criminal activity. In *Slapin v. Los Angeles International Airport, supra,* 65 Cal.App.3d 484, 135 Cal.Rptr. 296, plaintiff was attacked in a parking lot. Plaintiff alleged that prior to the incident, defendants were aware that the parking lot was unsafe unless properly supervised and maintained. Moreover, plaintiff alleged that defendants " 'carelessly, negligently, and improperly owned, operated, managed, maintained, supervised, controlled, lighted, and secured [the] parking area ... so as to maintain a dangerous condition of property ....' " (*Slapin, supra,* at pp. 486-487, 135 Cal.Rptr. 296.) The Court of Appeal held that the trial court erred in sustaining defendant's demurrer to the dangerous condition theory. "That a mugger thrives in dark public places is a matter of common knowledge. [Citations.] If defendant so poorly lighted the parking lot as to create a substantial risk of muggings, plaintiffs may be able to establish the elements of a cause of action under section 835." (*Id.,* at p. 488, 135 Cal.Rptr. 296.)

The instant case is indistinguishable from *Slapin.* The court in *Slapin* recognized that a defendant may not escape liability by claiming that plaintiff's injuries were caused by a criminal agency when the basis of plaintiff's cause of action is that the defendant created a reasonably foreseeable risk of that criminal conduct. (*Slapin,* at p. 490, 135 Cal.Rptr. 296; 4 Witkin, Summary of Cal.Law, *supra,* Torts § 643,

pp. 2922- 2923.) (See also *Lillie v. Thompson* (1947) 332 U.S. 459, 68 S.Ct. 140, 92 L.Ed. 73 [railroad liable for assault by stranger where woman railroad telegrapher negligently placed in isolated building at night]; *Campodonico v. State Auto Parks, supra,* 10 Cal.App.3d 803, 89 Cal.Rptr. 270 [plaintiff could state cause of action based on negligent maintenance of parking lot where she was criminally assaulted].)

[11] Plaintiff alleges here that the property was in a dangerous condition because the thick and untrimmed foliage and trees around the parking lot and stairway permitted the assailant to perpetrate his crime; ***850 **1201** she further alleges that defendants were aware of the condition and failed to take reasonable protective measures, including trimming the foliage or warning her of the danger. [FN11] Defendants' inaction, she alleges, created a reasonably foreseeable risk that she and others using the stairway would be injured. In light of the relationship between plaintiff and defendants as well as the facts known to the defendants, we ***813** conclude that plaintiff has stated a cause of action under the provisions of the Tort Claims Act. [FN12]

FN11. As we noted in *Ducey, supra,* when a public entity has notice of a dangerous condition, the unreasonable failure to "protect against" the condition may subject it to liability. As defined by statute, "protect against" includes "providing safeguards against a dangerous condition or warning of a dangerous condition." (§ 830.)

FN12. A finding that plaintiff has stated a cause of action under section 835 does not result in the defendants' automatic liability. First, the defendants are entitled to any defense which a private person may raise. (§ 815.) Secondly, a public entity is entitled to show that "the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury." (§ 835.4.)

The circumstances here are clearly different from those in *Hayes v. State of California, supra,* 11 Cal.3d 469, 113 Cal.Rptr. 599, 521 P.2d 855. In *Hayes,* this court articulated two considerations which weighed against holding a university liable for attacks upon two young men who were using the university's beach at night. We noted: "While we acknowledge that the warning called for by plaintiffs might be beneficial in some instances, both public awareness of the prevalence of crime and policy factors militate against imposing a governmental duty to warn in circumstances such as these.

"First, it is indisputable that the public is aware of the incidence of violent crime, particularly in unlit and little used places. Thus, it would serve little purpose for government to further remind the public of this unfortunate circumstance in society.

"Next, to the extent warning of past criminal conduct might serve a beneficial purpose, it--unlike cautioning against a specific hazard in the *use* of property--admonishes against any use of the property whatever, thus effectively closing the area. But determining and regulating the use of public property are better left to legislative and administrative bodies, rather than to the judiciary." (*Hayes, supra,* at pp. 472-473, 113 Cal.Rptr. 599, 521 P.2d 855, fn. omitted.)

[12] While these factors may have been appropriate considerations in the context of *Hayes* they are inapplicable here. In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime. Here the parking lot was not one of the "unlit and little used places" to which we referred in *Hayes.* Plaintiff was lawfully on the campus and was attacked in broad daylight in a place where school officials knew she and others as well as the assailant might be. Further, the warnings ***814** sought here would not result in preventing the students from using the campus or its facilities, only in alerting them to unknown dangers and encouraging them to exercise more caution.

An examination of the policies discussed in *Rowland v. Christian, supra,* 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561, and other cases compels the conclusion that the defendants did in fact owe the plaintiff a duty

of care. First, the allegations, if proved, suggest that harm to the plaintiff was clearly foreseeable. In light of the alleged prior similar incidents in the same area, the defendants were on notice that ***851 **1202 any woman who might use the stairs or the parking lot would be a potential target. Secondly, it is undisputed that plaintiff suffered injury. Third, given that the defendants were in control of the premises and that they were aware of the prior assaults, it is clear that failure to apprise students of those incidents, to trim the foliage, or to take other protective measures closely connects the defendants' conduct with plaintiff's injury. These factors, if established, also indicate that there is moral blame attached to the defendants' failure to take steps to avert the foreseeable harm. Imposing a duty under these circumstances also furthers the policy of preventing future harm. Finally, the duty here does not place an intolerable burden on the defendants.

The fact that the defendants are a public entity and its agents also does not preclude the imposition of a duty of care. As we have often noted, the policy of compensating injured parties is an important one. "Unless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by wilful or negligent acts must prevail." (*Ramos v. Madera* (1971) 4 Cal.3d 685, 692, 94 Cal.Rptr. 421, 484 P.2d 93.) As a community college district responsible for overseeing the campus, the defendant and its agents are in a superior position to know about the incidences of crime and to protect against any recurrences.

IMMUNITY

Having thus established that the defendants owed plaintiff a duty of care, we turn to the question of immunity. (See *Davidson v. City of Westminster, supra,* 32 Cal.3d at pp. 201-202, 185 Cal.Rptr. 252, 649 P.2d 894.) In her complaint plaintiff alleges that "[d]efendants ... breached these duties and were negligent and careless in that they failed and neglected to take reasonable precautions to protect [her] from violent attacks or to safeguard her security, failed and neglected to employ adequate police personnel to patrol the parking lot and stairway in question ... and that they failed to properly perform or otherwise discharge the duty of protection undertaken and assumed."

***815** [13] Although the district is empowered to employ a police force on its campus and apparently did so in this case, the Government Code grants immunity to public entities for failure to provide police protection. (§ 845.) This immunity is meant to protect the budgetary and political decisions which are involved in hiring and deploying a police force. 1: (Cal.Law Rev.Commission com. to § 845.) As a public entity the district may not, therefore, be held liable in this case for any failure to provide adequate police protection.

[14] Plaintiff's complaint, however, alleges not only inadequate police protection but failure to warn her of the known danger and failure to trim the foliage growing by the parking lot stairway. No provision in the Torts Claim Act explicitly immunizes a public defendant for failure to warn. (See *Tarasoff, supra,* 17 Cal.3d at p. 446, 131 Cal.Rptr. 14, 551 P.2d 334.) As we noted in *Tarasoff, supra,* the defendant is not immune from liability pursuant to section 820.2 (immunity for discretionary decisions) because the failure to warn does not involve those basic policy decisions which this immunity provision was meant to protect. (*Johnson v. State of California* (1968) 69 Cal.2d 782, 787, 73 Cal.Rptr. 240, 447 P.2d 352; *Tarasoff, supra,* 17 Cal.3d at pp. 444, 131 Cal.Rptr. 14, 551 P.2d 334.) Thus we conclude that plaintiff is entitled to prove that the failure to warn, to trim the foliage, or to take other reasonable measures to protect her was the proximate cause of her injuries.

Plaintiff's first cause of action alleges facts which are sufficient to establish a common law duty of care but which are inadequate to state a cause of action against a public entity. (See § 815.) Plaintiff's second cause of action, by incorporating by reference the allegations in the first cause of action and by pleading the elements of section 835, states a cause of action against defendants. Thus the judgment **1203 ***852 of dismissal was entered erroneously. The judgment is reversed.

MOSK, KAUS, REYNOSO, GRODIN and P.A. SMITH [FN*], JJ., concur.

FN* Assigned by the Chairperson of the Judicial Council.

BIRD, C.J., concurs in the judgment.

36 Cal.3d 799, 685 P.2d 1193, 205 Cal.Rptr. 842, 19 Ed. Law Rep. 689

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In re RANDY G., a Person Coming Under the Juvenile Court Law.
THE PEOPLE, Plaintiff and Respondent,
v.
RANDY G., Defendant and Appellant.
No. S089733.

Supreme Court of California

Aug. 13, 2001.

SUMMARY

After denying a 14-year-old minor's motion to suppress evidence, the juvenile court declared the minor to be a ward of the court for possessing a knife with a locking blade on school grounds in violation of Pen. Code, § 626.10, subd. (a). School security officers had taken the minor from a classroom to the hallway and obtained his consent to a search of his bag and to a patdown search, during which the officers found the knife. In his motion to suppress, the minor alleged that the officers lacked reasonable suspicion that he engaged in criminal conduct or violated a school rule, and thus his consent to the searches was the product of an unlawful detention. (Superior Court of Los Angeles County, No. FJ21687, Gary Bounds, Temporary Judge. [FN*]) The Court of Appeal, Second Dist., Div. Three, No. B133952, affirmed, applying a reasonable-suspicion standard and concluding that the detention was reasonable under the circumstances.

FN* Pursuant to California Constitution, article VI, section 21.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that school officials have the power to stop a minor student in order to ask questions or conduct an investigation even in the absence of reasonable suspicion of criminal activity or a violation of a school rule, so long as this authority is not exercised in an arbitrary, capricious, or harassing manner. Although individualized suspicion is usually a prerequisite to a constitutional search or seizure, under the Constitution, the usual prerequisites can be modified when special needs render those rules impracticable. Special needs exist in the public school context in light of the high governmental interest in education and the need to maintain order in schools, and in light of the minimal intrusion on a minor stopped and questioned. (Opinion by Baxter, J., with George, C. J., Kennard, Chin, and Brown, JJ., concurring. Concurring opinion by Werdegar, J. (see p. 569).) ***557**

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Schools § 52--Students--Minor Student on School Grounds--Detention by School Official--In Absence of Reasonable Suspicion:Arrest § 8--Temporary Detention.
In a wardship proceeding, the juvenile court did not err in denying a 14-year-old minor's motion to suppress evidence of a knife with a locking blade (Pen. Code, § 626.10, subd. (a)), found by school security officers in a consensual patdown search of the minor on school grounds, which occurred after the officers had taken the minor from a classroom to the hallway. The search was not the fruit of an unlawful detention. Even if a detention occurred when the officers took the minor from the classroom to the hallway, detentions of minor students on school grounds do not offend the federal Constitution, so long as they are not arbitrary, capricious, or for the purposes of harassment. Reasonable suspicion need not be shown. Although individualized suspicion is usually a prerequisite to a constitutional search or seizure, under the Constitution, the usual prerequisites can be modified when special needs render those rules impracticable. Special needs exist in the public school context in light of the high governmental interest in education and the need to maintain order in schools, and in light of the minimal intrusion on a minor stopped and questioned. Further, there is no distinction between school security officers and other school personnel for the purpose of this rule. (Disapproving to the extent inconsistent: *In re Alexander B.* (1990) 220 Cal.App.3d 1572 [270 Cal.Rptr. 342]; *In re Frederick B.* (1987) 192 Cal.App.3d 79 [237 Cal.Rptr. 338].)

[See 4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Illegally Obtained Evidence, § 319; West's Key Number Digest, Schools k. 169.5.]

(2) Criminal Law § 331--Evidence--Admissibility--

Products of Search and Seizure.
To decide whether relevant evidence, obtained by means asserted to be unlawful, must be excluded, courts look exclusively to whether its suppression is required by the United States Constitution.

(3) Arrest § 9--Detention.
A detention occurs only when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. Normally, where the police have succeeded in apprehending a suspect, there is no dispute that the suspect's liberty has been restrained, since the suspect, in the absence of the stop, would have been free to continue on his or her way. ***558**

(4) Schools § 52--Students--Freedom While on School Grounds.
Minor students at school lack freedoms afforded adults. Unemancipated minors lack some of the most fundamental rights of self-determination, including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians. The power that public schools exercise is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. Minor students are required to be in school (Ed. Code, § 48200). While they are in school, the primary duty of school officials and teachers is their education and training. The state has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. Apart from education, the school has the obligation to protect pupils from mistreatment by other children and to protect teachers themselves from violence.

(5) Schools § 60--Students--Discipline--Supervisory Powers.
At school, occurrences calling for discipline are frequent occurrences and sometimes require immediate, effective action. To respond in an appropriate manner, teachers and school administrators must have broad supervisory and disciplinary powers. Encounters on school grounds between students and school personnel are constant and much more varied than those on the street between citizens and law enforcement officers. While at school, a student may be stopped, told to remain in or leave a classroom, directed to go to a particular classroom, given an errand, sent to study hall, called to the office, or held after school. Unlike a citizen on the street, a minor student is subject to the ordering and direction of teachers and administrators.

(6) Arrest § 35--Reasonableness:Searches and Seizures § 54--Reasonableness.
The test for assessing the reasonableness of official conduct under U.S. Const., 4th Amend., is essentially the same for a seizure as for a search. It is necessary to focus upon the governmental interest that is alleged to justify the official intrusion upon the constitutionally protected interests of the private citizen. There is no ready test for determining reasonableness other than to balance the need to search or seize against the invasion that the search or seizure entails.

COUNSEL

Robert S. Gerstein, under appointment by the Supreme Court; and Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant. ***559**

Mark D. Rosenbaum for American Civil Liberties Union as Amicus Curiae on behalf of Defendant and Appellant.

John T. Philipsborn for California Attorneys for Criminal Justice as Amicus Curiae on behalf of Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, William T. Harter, Joana Perez Castille, Donald E. De Nicola and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

Parker & Covert, Spencer E. Covert and Barbara J. Ginsberg for California School Boards Association's Education Legal Alliance and California Association of Supervisors of Child Welfare and Attendance as Amici Curiae on behalf of Plaintiff and Respondent.

BAXTER, J.

In this case we are asked to determine whether school officials may detain a minor student on school grounds in the absence of reasonable suspicion of criminal activity or violation of a school rule. The minor, Randy G., contends that when school security officers called him out of class into the hallway, he was detained without cause in violation of his rights under the Fourth Amendment to the United States

Constitution. The Court of Appeal, relying on *In re Frederick B.* (1987) 192 Cal.App.3d 79 [237 Cal.Rptr. 338], applied the reasonable-suspicion standard to this encounter, which occurred on school grounds and during school hours, and found that it had been satisfied. We do not decide whether the record supports that finding of reasonable suspicion because we conclude instead that the broad authority of school administrators over student behavior, school safety, and the learning environment requires that school officials have the power to stop a minor student in order to ask questions or conduct an investigation even in the absence of reasonable suspicion, so long as such authority is not exercised in an arbitrary, capricious, or harassing manner. On this ground, we affirm the Court of Appeal.

1. Background

A petition filed pursuant to Welfare and Institutions Code section 602 alleged that the 14-year-old minor had violated Penal Code section 626.10, ***560** subdivision (a) by possessing a knife with a locking blade on school grounds. Prior to the jurisdictional hearing, the minor moved to suppress evidence of the knife, asserting that its discovery during a consent search had been tainted by the preceding illegal detention in violation of the Fourth Amendment. Moving him from the classroom into the hallway for questioning was, he claimed, an unreasonable detention because there was no articulable basis for a reasonable suspicion that he had engaged or was engaging in the proscribed activity, i.e., violation of a criminal statute or school rule. The motion was denied, after which the petition was sustained. The minor was declared a ward of the court and placed on probation.

The evidence offered at the hearing on the motion to suppress reflects the following:

Cathy Worthy, a campus security officer at the public high school attended by the minor, testified that during "passing time," [FN1] approximately 9:00 a.m. on March 16, 1999, she was between "C building and A auditorium." As she came around one of two large pillars in that area, she observed the minor and a friend in an area of the campus in which students are not permitted to congregate. When the minor saw Worthy, he "fixed his pocket very nervously." Some of the lining of the left pocket was still sticking out. Worthy asked the two if they needed anything and instructed them to go to class. The minor finished fixing his pocket and went back to class. Worthy followed them to see where they were going because the minor acted "very paranoid and nervous." She then notified her supervisor and at his direction summoned another security officer.

> FN1 This appears to be a term used to describe the time between classes when high school students move from one classroom to another.

When the two officers went to the classroom, Worthy asked the minor if she could see him outside. Once in the hallway, Worthy asked the minor if he had anything on him. He replied "no" and repeated that denial when asked again. The second officer asked the minor for consent to search his bag. The minor consented, and replied "no" again to Worthy's repeated question whether he had anything on him. The second officer then asked the minor for permission to do a patdown search. Worthy asked if it was okay, and the minor replied "yes." A patdown search by the other officer revealed a knife, later found to have a locking blade, in the minor's left pocket.

During the 10 minutes the minor was in the hallway being questioned by Worthy before the consent to search was given, he was not free to leave.

Commenting that the officer had engaged in "good security work" based on the minor's looking nervous or paranoid and adjusting his pocket upon seeing her, the judge denied the motion to suppress. ***561**

On appeal from the order declaring him a ward of the court, the minor repeated the arguments made in support of his motion to exclude the knife-i.e., that because the campus security officer had lacked reasonable suspicion of criminal activity or violation of a school rule, the detention violated his right to be free of unreasonable searches and seizures guaranteed by the Fourth Amendment, and that his consent to search was a product of that unlawful detention. The Court of Appeal agreed with the minor that the standard to be applied was whether "the detaining officer has reasonable suspicion that the person to be detained has been, is, or is about to be engaged in criminal activity" (*In re Frederick B., supra*, 192 Cal.App.3d at pp. 84-85) or is about to engage in a violation of those school rules that exist for the protection of other students attending school or for the preservation of order at the school. The *Frederick B.* court had adapted its standard for judging the lawfulness of a *detention* of a student from *In re William G.* (1985) 40 Cal.3d 550, 564 [221 Cal.Rptr.

118, 709 P.2d 1287] (*William G.*) and *New Jersey v. T. L. O.* (1985) 469 U.S. 325, 341-342 [105 S.Ct. 733, 742-743, 83 L.Ed.2d 720] (*T. L. O.*), both of which involved the *search* of a student. Applying that standard (as expanded to include school rules and regulations designed for the protection of students or the preservation of order), the Court of Appeal held that the detention of the minor was reasonable. The minor's violation of a school rule, together with his nervous fixing of the protruding lining of his pocket, gave rise to reasonable suspicion sufficient to justify a detention for the purpose of asking questions about the conduct the security officer had observed.

In this court, the minor contends that no articulable facts supported a reasonable suspicion of misconduct. The People argue that the reasonable-suspicion standard does not apply to a detention of a student by a school official on school grounds.

II. Discussion

(1a) According to the minor, the question presented here is whether the circumstances outlined above "made the security officer aware of sufficient ' articulable facts' to warrant reasonable suspicion that [the minor] was committing a crime, or violating a rule designed to protect other students or to maintain order in the school, thereby justifying his detention for investigation of the offense." He contends that the absence of facts supporting reasonable suspicion rendered his detention invalid under the Fourth Amendment, requiring suppression of the locking-blade knife found in his pocket.

(2) To decide whether relevant evidence obtained by assertedly unlawful means must be excluded, we look exclusively to whether its suppression is ***562** required by the United States Constitution. (*In re Lance W.* (1985) 37 Cal.3d 873, 885-890 [210 Cal.Rptr. 631, 694 P.2d 744].)

A

(1b) The first question, then, is whether the minor was detained. (3)A detention occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen ...." (*Terry v. Ohio* (1968) 392 U.S. 1, 19, fn. 16 [88 S.Ct. 1868, 1879, 20 L.Ed.2d 889]; *People v. Souza* (1994) 9 Cal.4th 224, 229 [36 Cal.Rptr.2d 569, 885 P.2d 982].) In the general run of cases, where the police have succeeded in apprehending the suspect, there is no dispute that the suspect's liberty has been thereby restrained. (E.g., *Terry, supra*, 392 U.S. at pp. 6- 7 [88 S.Ct. at p. 1872] [officer grabbed defendant while he was walking down the street and spun him around]; *Souza, supra*, 9 Cal.4th at p. 228 [defendant was stopped while running down the street].) After all, in those cases, the defendant, in the absence of the stop, would have been free to continue on his way.

(4) A minor at school, however, can hardly be said to be free to continue on his or her way. "Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination-including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians." (*Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 654 [115 S.Ct. 2386, 2391, 132 L.Ed.2d 564] (*Vernonia*).) Although the high court has rejected the notion that public schools, like private schools, exercise only parental power over their students, the power that public schools do exercise is nonetheless "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." (*Id.* at p. 655 [115 S.Ct. at p. 2392].)

To begin, minor students are required to be in school. (Ed. Code, § 48200.) While they are there, the "primary duty of school officials and teachers ... is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern." (*T. L. O., supra*, 469 U.S. 325, 350 [105 S.Ct. 733, 747] (conc. opn. of Powell, J.); Cal. Const., art. I, § 28, subd. (c) ["All students and staff of public primary, elementary, ***563** junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful"].) California fulfills its obligations by requiring each school board to establish rules and regulations to govern student conduct and discipline (Ed. Code, § 35291) and by permitting the local district to establish a police or security department to enforce those rules. (Ed. Code, § 38000.)

(5) At school, events calling for discipline are frequent occurrences and sometimes require

"immediate, effective action." (*Goss v. Lopez* (1975) 419 U.S. 565, 580 [95 S.Ct. 729, 739, 42 L.Ed.2d 725].) To respond in an appropriate manner, " 'teachers and school administrators must have broad supervisory and disciplinary powers.' " (*William G., supra*, 40 Cal.3d at p. 563, quoting *Horton v. Goose Creek Ind. Sch. Dist.* (5th Cir. 1982) 690 F.2d 470, 480.) California law, for example, permits principals, teachers, and any other certificated employees to exercise "the same degree of physical control over a pupil that a parent would be legally privileged to exercise ... which in no event shall exceed the amount of physical control reasonably necessary to maintain order, protect property, or protect the health and safety of pupils, or to maintain proper and appropriate conditions conducive to learning." (Ed. Code, § 44807.)

Encounters on school grounds between students and school personnel are constant and much more varied than those on the street between citizens and law enforcement officers. While at school, a student may be stopped, told to remain in or leave a classroom, directed to go to a particular classroom, given an errand, sent to study hall, called to the office, or held after school. Unlike a citizen on the street, a minor student is "subject to the ordering and direction of teachers and administrators.... [¶] [A student is] not free to roam the halls or to remain in [the] classroom as long as she please[s], even if she behave[s] herself. She [is] deprived of liberty to some degree from the moment she enter[s] school, and no one could suggest a constitutional infringement based on that basic deprivation." (*Wallace by Wallace v. Batavia School Dist. 101* (7th Cir. 1995) 68 F.3d 1010, 1013 (*Wallace*); see also *Milligan v. City of Slidell* (5th Cir. 2000) 226 F.3d 652, 655 (*Milligan*) ["any such right of unhindered attendance [in class] is logically inconsistent with the mandate of compulsory attendance and a structured curriculum, and it hardly squares with the schools' obligation to 'inculcate the habits and manners of civility ....' "].)

(1c) Thus, when a school official stops a student to ask a question, it would appear that the student's liberty has not been restrained over and above the limitations he or she already experiences by attending school. Accordingly, the conduct of school officials in moving students about the ***564** classroom or from one classroom to another, sending students to the office, or taking them into the hallway to ask a question would not seem to qualify as a detention as defined by the Fourth Amendment. In the absence of a Fourth Amendment claim, relief, if at all, would come by showing that school officials acted in such an arbitrary manner as to deprive the student of substantive due process in violation of the Fourteenth Amendment. (See *County of Sacramento v. Lewis* (1998) 523 U.S. 833, 845-847 [118 S.Ct. 1708, 1716-1717, 140 L.Ed.2d 1043].)

A number of factors, however, counsel caution before holding that the Fourth Amendment does not apply to the exercise of physical control by school officials over their students. First, we must acknowledge the United States Supreme Court's reluctance to expand the concept of substantive due process. The court has instructed that " '[w]here a particular Amendment provides an explicit textual source of constitutional protection against *a particular sort of government behavior*, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.' " (*County of Sacramento v. Lewis, supra*, 523 U.S. at p. 842 [118 S.Ct. at p. 1714], italics added.) Here, of course, the "particular sort of government behavior" engaged in by school officials would unquestionably constitute a detention *outside* the school setting.

Second, we have employed the Fourth Amendment framework in the analogous circumstances of parole and probation searches, even though it might appear that parolees and probationers have no Fourth Amendment protection against suspicionless searches and seizures. (See *People v. Reyes* (1998) 19 Cal.4th 743 [80 Cal.Rptr.2d 734, 968 P.2d 445]; *In re Tyrell J.* (1994) 8 Cal.4th 68 [32 Cal.Rptr.2d 33, 876 P.2d 519].) In *Tyrell J.*, for example, we held that a juvenile probationer subject to a valid search condition does not have a *reasonable* expectation of privacy over his or her person or property, which is the " 'touchstone' " of Fourth Amendment analysis. (*Tyrell J.*, at pp. 83, 86.) Nonetheless, we rejected the notion that the probationer has no legally cognizable privacy rights at all and permitted the probationer to challenge a search as arbitrary, capricious, or undertaken for harassment. (*Id.* at p. 87 & fn. 5.) Similarly, in *Reyes*, we held that a parolee subject to a valid search condition does not have "any expectation of privacy 'society is " prepared to recognize as legitimate" ' " yet may still challenge the search as arbitrary, capricious, or undertaken for harassment. (*Reyes, supra*, 19 Cal.4th at pp. 753-754.) By analogy, we might permit a minor student, even though he appears to retain no appreciable liberty on school grounds, to challenge the conduct of school officials as arbitrary, capricious, or harassing

under the Fourth Amendment, which, after all, was crafted to " ' "safeguard the privacy and security of individuals against ***565** *arbitrary* invasions by governmental officials." ' ..." (*Id.* at p. 750, citations omitted.)

Finally, we note that a number of federal cases have (without much analysis) held or assumed that, notwithstanding the considerable restraints on a student's movement by virtue of being at school, conduct by a school official to control that movement is a seizure within the meaning of the Fourth Amendment. (E.g., *Milligan, supra*, 226 F.3d at p. 655; *Wallace, supra*, 68 F.3d at pp. 1012-1014; *Hassan v. Lubbock Independent School Dist.* (5th Cir. 1995) 55 F.3d 1075, 1079-1080; *Edwards for and in behalf of Edwards v. Rees* (10th Cir. 1989) 883 F.2d 882, 884.)

Neither this court nor the Supreme Court has deemed stopping a student on school grounds during school hours, calling a student into the corridor to discuss a school-related matter, or summoning a student to the principal's office for such purposes to be a detention within the meaning of the Fourth Amendment. For the reasons stated above, we would be hesitant to term such conduct a "detention" here. However, we find it unnecessary to decide whether school officials' infringement on the residuum of liberty retained by the student is properly analyzed as a detention under the Fourth Amendment or as a deprivation of substantive due process under the Fourteenth Amendment, for (as we explain below) we discover that the test under either clause is substantially the same-namely, whether the school officials' conduct was arbitrary, capricious, or undertaken for purposes of harassment.

B

Although individualized suspicion is usually a prerequisite to a constitutional search or seizure, "such suspicion is not an 'irreducible' component of reasonableness." (*Indianapolis v. Edmond* (2000) 531 U.S. 32, 37 [121 S.Ct. 447, 451, 148 L.Ed.2d 333].) Under the Constitution, the usual prerequisites can be modified when " 'special needs' " render those rules impracticable. (See, e.g., *Griffin v. Wisconsin* (1987) 483 U.S. 868, 873 [107 S.Ct. 3164, 3168, 97 L.Ed.2d 709].) "Special needs" exist "in the public school context." (*Vernonia, supra*, 515 U.S. at p. 653 [115 S.Ct. at p. 2391].) In *T. L. O.*, for example, the court permitted the on-campus search of a minor student's person, the type of intrusion that ordinarily must be supported by probable cause to believe a violation of the law has occurred, so long as there were reasonable grounds for suspecting the search would uncover evidence of a violation of law or school rules. (*T. L. O., supra*, 469 U.S. at pp. 340-342 [105 S.Ct. at pp. 742-743].) In *Vernonia*, the court approved drug testing of student-athletes, even in the absence of any individualized suspicion of drug use, based once again on the special needs of the public school context. (*Vernonia, supra*, 515 U.S. at pp. 653-657 [115 S.Ct. at p. 2390-2393].) ***566**

Vernonia and *T. L. O.* both involved searches. The issue here is a seizure. (6) Still, the test for assessing the reasonableness of official conduct under the Fourth Amendment is essentially the same: "it is necessary ' first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' " (*Terry v. Ohio, supra*, 392 U.S. at pp. 20- 21 [88 S.Ct. at p. 1879], quoting *Camara v. Municipal Court* (1967) 387 U.S. 523, 534-537 [87 S.Ct. 1727, 1733-1735, 18 L.Ed.2d 930].) (1d) Here, "the ' reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." (*Vernonia, supra*, 515 U.S. at p. 656 [115 S.Ct. at p. 2392].)

The governmental interest at stake is of the highest order. "[E]ducation is perhaps the most important function of state and local governments." (*Brown v. Board of Education* (1954) 347 U.S. 483, 493 [74 S.Ct. 686, 691, 98 L.Ed. 873, 38 A.L.R.2d 1180].) "Some modicum of discipline and order is essential if the educational function is to be performed." (*Goss v. Lopez, supra*, 419 U.S. at p. 580 [95 S.Ct. at p. 739].) School personnel, to maintain or promote order, may need to send students into and out of classrooms, define or alter schedules, summon students to the office, or question them in the hall. Yet, as the high court has observed, school officials "are not in the business of investigating violations of the criminal laws ... and otherwise have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence." (*Skinner v. Railway Labor Executives' Assn.* (1989) 489 U.S. 602, 623 [109 S.Ct. 1402, 1417, 103 L.Ed.2d 639].) Those officials must be permitted to exercise their broad supervisory and disciplinary powers, without worrying that every encounter with a student will be converted into an opportunity for constitutional review. To allow minor students to challenge each of

those decisions, through a motion to suppress or in a civil rights action under 42 United States Code section 1983, as lacking articulable facts supporting reasonable suspicion would make a mockery of school discipline and order.

On the other hand, the intrusion on the minor student is trivial since, as stated, the minor is not free to move about during the school day. If the school can require the minor's presence on campus during school hours, attendance at assigned classes during their scheduled meeting times, appearance at assemblies in the auditorium, and participation in physical education classes out of doors, liberty is scarcely infringed if a school security guard leads the student into the hall to ask questions about a potential rule violation. ***567**

In *T. L. O.*, the court balanced the competing interests involving a search of a minor student on school grounds and reduced the quantum of suspicion required from probable cause to reasonable suspicion. The minor argues that the same reasonable-suspicion standard used for school searches should govern the assumed detention here. We disagree. Different interests are implicated by a search than by a seizure (*Horton v. California* (1990) 496 U.S. 128, 133 [110 S.Ct. 2301, 2305-2306, 110 L.Ed.2d 112]), and a seizure is "generally less intrusive" than a search. (*Segura v. United States* (1984) 468 U.S. 796, 806 [104 S.Ct. 3380, 3386, 82 L.Ed.2d 599](lead opn. of Burger, C. J.); cf. *United States v. Place* (1983) 462 U.S. 696, 706-708 [103 S.Ct. 2637, 2644- 2645, 77 L.Ed.2d 110].) In recognition of that distinction, the constitutionality of investigative detentions of persons on the streets is already measured by the standard of reasonable suspicion, not probable cause. Were we simply to extend that standard to the school setting, we would have failed utterly to accommodate the special needs existing there. Therefore, we conclude instead that detentions of minor students on school grounds do not offend the Constitution, so long as they are not arbitrary, capricious, or for the purposes of harassment. (Cf. *People v. Reyes, supra*, 19 Cal.4th at pp. 753-754 [applying same test to search of parolees]; *In re Tyrell J., supra*, 8 Cal.4th at p. 87 [juvenile probationers]; *People v. Bravo* (1987) 43 Cal.3d 600, 610 [238 Cal.Rptr. 282, 738 P.2d 336] [adult probationers].) Reasonable suspicion-whether called "particularized suspicion" (*People v. Reyes, supra*, 19 Cal.4th at p. 754), "articulable and individualized suspicion" (*People v. Glaser* (1995) 11 Cal.4th 354, 369 [45 Cal.Rptr.2d 425, 902 P.2d 729]), "founded suspicion" (*People v. Souza, supra*, 9 Cal.4th at p. 230), or "reasonable cause" (*id.* at p. 232)-need not be shown. [FN2]

> FN2 To the extent that *In re Alexander B.* (1990) 220 Cal.App.3d 1572 [270 Cal.Rptr. 342] and *In re Frederick B., supra*, 192 Cal.App.3d 79, are inconsistent with this conclusion, they are disapproved.

Our conclusion finds support in cases from other jurisdictions. In *In re D.E.M.* (1999) 1999 Pa.Super. 59 [727 A.2d 570], school officials, after learning that police had received an anonymous tip that the minor had a gun, removed the minor from class and brought him to the principal's office. The gun was discovered during a consent search. The minor sought to suppress the gun as the fruit of an unlawful detention. The court assessed the reasonableness of the school officials' conduct in removing the minor from class by balancing the state's substantial interest in maintaining a safe educational environment against the minor's limited control over his person during school hours and concluded that the policy served by *Terry*'s reasonable-suspicion standard does not apply to the detention and questioning of a student by school officials. (*Id.* at pp. 577-578 & fn. 19.) The court noted, as we have above, that "the mere detention and questioning of a student ***568** constitutes a more limited intrusion than a search of his person and effects. Thus, we think it makes no sense to require the same level of suspicion to justify the school officials' actions in each situation." (*Id.* at p. 577, fn. 18.) "To require teachers and school officials to have reasonable suspicion before merely questioning a student would destroy the informality of the student teacher relationship, which the United States Supreme Court has respected and preserved. *See T.L.O., supra*, at 339, 105 S.Ct. at 741, 83 L.Ed.2d at 733. Instead, teachers and school officials would be forced to conduct surveillance, traditionally a law enforcement function, before questioning a student about conduct which poses a serious threat to the safety of the students for whom they are responsible." (*Id.* at p. 577, fn. omitted.)

The Florida District Court of Appeal reached the same conclusion in *W. J. S. v. State* (Fla.Dist.Ct.App. 1982) 409 So.2d 1209. There, a teacher had a security guard bring four students to the principal's office; the students looked suspicious because "they 'appeared to look away from her, to look at something else.' " A subsequent search uncovered a small purse containing marijuana. The court held that reasonable suspicion was not necessary to "detain a

student and take him ... 'to be checked out' on the school premises." (*Id.* at p. 1210.)

The minor has never contended that Worthy acted arbitrarily, capriciously, or in a harassing manner in calling him into the hall. Hence, no Fourth Amendment violation occurred.

C

Seemingly acknowledging the state's vital interest in establishing and maintaining a safe educational environment, the minor then urges that the reasonable-suspicion standard, even if inapplicable to the conduct of teachers and administrators, should apply to encounters between students and school *security officers*. In holding that the reasonable-suspicion standard remains appropriate for such cases, he reasons, this court will not necessarily be committing itself to that standard "across the whole range of student encounters with teachers, principals, or other personnel." We decline the invitation to distinguish the power of school security officers over students from that of other school personnel, whose authority over student conduct may have been delegated to those officers. The same observation and investigation here could well have been undertaken by a teacher, coach, or even the school principal or vice-principal. If we were to draw the distinction urged by the minor, the extent of a student's rights would depend not on the nature of the asserted infringement but on the happenstance of the status of the employee who observed and investigated the misconduct. Of equal ***569** importance, were we to hold that school security officers have less authority to enforce school regulations and investigate misconduct than other school personnel, there would be no reason for a school to employ them or delegate to them duties relating to school safety. Schools would be forced instead to assign certificated or classified personnel to yard and hall monitoring duties, an expenditure of resources schools can ill afford. The title "security officer" is not constitutionally significant. [FN3] (Cf. *Ferguson v. City of Charleston* (2001) 532 U.S. 67, 83-84 [121 S.Ct. 1281, 1291-1292, 149 L.Ed.2d 205] [because the "primary purpose" of a program of testing obstetrics patients' urine for narcotics was "to generate evidence *for law enforcement purposes* .... this case simply does not fit within the closely guarded category of 'special needs' " (fns. omitted)].) Therefore, we will not interfere in the method by which local school districts assign personnel to monitor school safety.

FN3 The minor did not describe Worthy or the other guard as a law enforcement officer in his motion to suppress, which refers instead to a "School Official." Once found, the knife was turned over by the school principal to Officer Berrera, who was employed by the City of Montebello as a school police officer. The Montebello Police Department took the minor into custody and referred him for juvenile proceedings. In short, the school security officers who found the knife did not act as law enforcement officers. We therefore do not consider here the appropriate standard for assessing the lawfulness of seizures conducted by school officials in conjunction with or at the behest of law enforcement agencies. (See *T. L. O., supra*, 469 U.S. at p. 341, fn. 7 [105 S.Ct. at p. 743].)

III. Disposition

The judgment of the Court of Appeal is affirmed.

George, C. J., Kennard, J., Chin, J., and Brown, J., concurred.

WERDEGAR, J.

I concur. We face in this case a tension between two important considerations. On the one hand, teachers and school administrators have a solemn responsibility to protect the safety and well-being of our children and to ensure that schools can fulfill their educational mission. [FN1] On the other hand, minor children attending school, like all persons in America, possess rights under the Constitution. (See, e.g., *New Jersey v. T.L.O., supra*, 469 U.S. at pp. 333-334 [105 S.Ct. at pp. 738-739] [Fourth Amendment rights]; *Tinker v. Des Moines Independent School Dist.* (1969) 393 U.S. 503, 506 [89 S.Ct. 733, 736, 21 L.Ed.2d 731] (*Tinker*) [First Amendment rights]; ***570** *Goss v. Lopez* (1975) 419 U.S. 565 [95 S.Ct. 729, 42 L.Ed.2d 725] [due process rights].) [FN2]

FN1 "The primary duty of school officials and teachers ... is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." (*New Jersey v. T. L. O.* (1985) 469 U.S. 325, 350 [105 S.Ct. 733, 747, 83 L.Ed.2d 720]

(conc. opn. of Powell, J.).)

FN2 That school officials "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." (*Board of Education v. Barnette* (1943) 319 U.S. 624, 637 [63 S.Ct. 1178, 1185, 87 L.Ed. 1628, 147 A.L.R. 674].)

The high court, while recognizing that students do not leave their constitutional rights "at the schoolhouse gate" (*Tinker, supra*, 393 U.S. at p. 506 [89 S.Ct. at p. 736]), has also recognized the need for balance in evaluating the scope of their Fourth Amendment rights, explaining that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." (*New Jersey v. T. L. O., supra*, 469 U.S. at p. 340 [105 S.Ct. at p. 742].) In addition, "[i]t is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." (*Ibid.*)

The majority acknowledges this framework by considering a minor student's right to freedom from unreasonable searches and seizures under the Fourth Amendment within the context of a modern school setting. Although students unquestionably retain Fourth Amendment rights while in school, and "public school officials are subject to the limits placed on state action by the Fourteenth Amendment" (*New Jersey v. T. L. O., supra*, 469 U.S. at p. 334 [105 S.Ct. at p. 739]), not every encounter between teacher and student implicates the Fourth Amendment, for "the nature of those [constitutional] rights is what is appropriate for children in school." (*Vernonia School Dist. 47J v. Acton* (1995) 515 U.S. 646, 656 [115 S.Ct. 2386, 2392, 132 L.Ed.2d 564] (*Vernonia*); cf. *Terry v. Ohio* (1968) 392 U.S. 1, 19, fn. 16 [88 S.Ct. 1868, 1879, 20 L.Ed.2d 889] ["not all personal intercourse between policemen and citizens involves 'seizures' of persons"].)

Moreover, even where, as here, the circumstances of the encounter as viewed in the context of a school setting arguably support the conclusion the minor has been subjected to a "seizure" within the meaning of the Fourth Amendment, the standard for assessing the reasonableness of the challenged action must take into account "the schools' custodial and tutelary responsibility for children." (*Vernonia, supra*, 515 U.S. at p. 656 [115 S.Ct. at p. 2392].) As *Terry v. Ohio, supra*, 392 U.S. at page 21 [88 S.Ct. at page 1879], recognizes, "there is 'no ready test for determining reasonableness other than by balancing the need to [seize] against the invasion which the [seizure] entails.' " (Quoting *Camara v. Municipal Court* (1967) 387 U.S. 523, 536-537 [87 S.Ct. 1727, 1734-1735, 18 L.Ed.2d 930].) Accordingly, I agree with ***571** the majority's conclusion that "detentions of minor students on school grounds do not offend the Constitution, so long as they are not arbitrary, capricious, or for the purposes of harassment." (Maj. opn., *ante*, at p. 567.)

The majority finds it unnecessary to decide whether the security guard in this case subjected minor Randy G. to a detention within the meaning of the Fourth Amendment. (Maj. opn., *ante*, at p. 565.) Accordingly, the majority does not foreclose the possibility that a teacher or school official may be found, in an appropriate setting, to have done so. With that understanding of the majority opinion, I concur. ***572**

Cal. 2001.

In re RANDY G., a Person Coming Under the Juvenile Court Law. THE PEOPLE, Plaintiff and Respondent, v. RANDY G., Defendant and Appellant.

END OF DOCUMENT

C

SACRAMENTO POLICE OFFICERS ASSOCIATION et al., Plaintiffs and Appellants,
v.
ARTURO VENEGAS, JR., as Chief of Police, etc., et al., Defendants and Respondents.
No. C030428.

Court of Appeal, Third District, California.

Sept. 3, 2002.

SUMMARY

A city police officer and a police officers association petitioned for a writ of mandate against the chief of police and the city, alleging that, pursuant to the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), the officer was entitled to read and respond to information maintained in the department's internal affairs section regarding an allegation of neglect of duty by the officer relating to the theft of a city-owned car entrusted to him. The trial court denied the petition. (Superior Court of Sacramento County, No. 98CS00676, Ronald B. Robie, Judge.)

The Court of Appeal reversed and remanded the matter for further proceedings. The court held that under Gov. Code, § 3305, which provides that a comment adverse to a public safety officer shall not be entered in the officer's personnel file or any other file used for personnel purposes without the officer having first read the comment, the police department was required to disclose any adverse information maintained in the department's internal affairs section regarding the allegation of neglect of duty by the officer relating to the theft of the car. The department's internal affairs index card in the officer's name that listed all complaints against him was a file used for personnel purposes within the meaning of the statute, and he was entitled to read and respond to the adverse comment even though it did not result in any personnel action against him. The court further held that although the officer did not have the right, under Gov. Code, § § 3305 and 3306, to access to information that did not constitute an adverse comment, the department could be required to answer affirmatively whether the file contained an adverse comment and, if so, to permit the officer to discover and respond to the adverse comment. (Opinion by Scotland, P. J., with Raye and Kolkey, JJ., concurring.) *917

HEADNOTES

Classified to California Digest of Official Reports

(1) Law Enforcement Officers § 1--Public Safety Officers Procedural Bill of Rights Act--Officer's Right to Information Kept by Internal Affairs--Officer Subject to Interrogation.
A city police officer was not entitled, pursuant to Gov. Code, § 3303, subd. (g) (conditions for interrogation of public safety officers), to read and respond to information maintained in the police department's internal affairs section regarding an allegation of neglect of duty by the officer relating to the theft of a city-owned car entrusted to him. Gov. Code, § 3303, subd. (g), was inapposite, since it applies to the interrogation of a peace officer who is under investigation, whereas the investigation into the officer's alleged neglect of duty had ended and he was never interrogated.

(2) Law Enforcement Officers § 1--Public Safety Officers Procedural Bill of Rights Act--Officer's Right to Disclosure of Comment Used for Personnel Purposes.
Regardless of whether the employing agency contemplates or has rejected further action regarding an adverse comment made against a peace officer employee, a public safety officer is entitled to disclosure of the comment if it is entered in an agency file used for a personnel purpose. An adverse comment contained in a background investigation file is subject to disclosure even if the officer does not suffer some sort of adverse consequence, as long as it has that potential. The Legislature utilized broad language in enacting Gov. Code, § § 3305 and 3306, of the Public Safety Officers Procedural Bill of Rights Act. The events that will trigger an officer's rights under those statutes are not limited to formal disciplinary actions, such as the issuance of letters of reproval or admonishment or specific findings of misconduct. Rather, an officer's rights are triggered by the entry of any adverse comment in a personnel file or any other file used for a personnel purpose. Even though an adverse comment does not directly

result in punitive action, it has the potential of creating an adverse impression that could influence future personnel decisions concerning an officer, including decisions that do not constitute discipline or punitive action. The legislative remedy was to ensure that an officer is made aware of adverse comments and is given an opportunity to file a written response, should he or she choose to do so.

(3) Law Enforcement Officers § 1--Public Safety Officers Procedural Bill of Rights Act--Officer's Right to Adverse Information Kept by Internal Affairs.

Under Gov. Code, § 3305, of the Public Safety ***918** Officers Procedural Bill of Rights Act, which provides that a comment adverse to a public safety officer shall not be entered in the officer's personnel file or any other file used for personnel purposes without the officer having first read the comment, a city police department was required to disclose any adverse information maintained in the department's internal affairs section regarding an allegation of neglect of duty by a police officer relating to the theft of a city-owned car entrusted to him. The department's internal affairs index card in the officer's name that listed all complaints against him was a file used for personnel purposes within the meaning of the statute, and he was entitled to read and respond to the adverse comment even though it did not result in any personnel action against him. The department handled all complaints about its peace officers pursuant to Pen. Code, § 832.5 et seq., whether the complaints were from citizens or other peace officers, and the internal affairs index card constituted a file statutorily defined to be a personnel record for purposes of disclosure under Pen. Code, § 832.5. Moreover, the function of a police agency's internal affairs section is to investigate complaints and incidents to determine an officer's fitness to continue to serve, and whether disciplinary or other corrective action is required. That is a personnel purpose.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 774; West's Key Number Digest, Municipal Corporations ⚷ 185(3).]

(4) Law Enforcement Officers § 1--Public Safety Officers Procedural Bill of Rights Act--Officer's Right to Information Kept by Internal Affairs--Scope of Relief.

A police officer established a prima facie case for issuance of a writ of mandate pursuant to the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), by alleging that the city police department maintained a file under his name containing a charge made by a superior officer that he was guilty of neglect of duty with respect to the theft of his city-owned car. The department's response did not specifically admit that the officer's internal affairs file contained an adverse comment; it simply stated that the file reflected there was an investigation into the theft of the car. Although the officer did not have the right, under Gov. Code, § § 3305 and 3306, to access to information that did not constitute an adverse comment, the department could be required to answer affirmatively whether the file contained an adverse comment and, if so, to permit the officer to discover and respond to the adverse comment. ***919**

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SCOTLAND, P. J.

The Sacramento Police Officers Association and police officer Michael B. Kime appeal from a judgment denying their petition for a writ of mandate against Arturo Venegas, Jr., as Chief of Police, and the City of Sacramento. The interests of the Sacramento Police Officers Association and of Kime are unified; thus, for convenience, we will refer to their positions as those of Kime. The interests of Venegas and of the City of Sacramento are unified and, in fact, are the interests of Kime's employer, the Sacramento City Police Department (the Department); for convenience, we will refer to their interests as those of the Department.

Kime contends that, pursuant to the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.), he is entitled to read and respond to information maintained in the Department's internal affairs section regarding an allegation of neglect of duty by Kime relating to the theft of a city-owned car entrusted to him. The Department acknowledges that its internal affairs section maintains an index card for each of the Department's public safety officers and that the index card "lists all complaints made against that officer, whether founded, unfounded, exonerated or not sustained." The Department also acknowledges

that its internal affairs index card in Kime's name refers to an investigation of the stolen car incident. However, the Department asserts that Kime has no right to review this information because the incident did not result in any personnel action adverse to Kime, and because the internal affairs index card is not a personnel file or any other file used for personnel purposes by the Department.

The resolution of this dispute turns on the interpretation of Government Code section 3305, which provides that a comment adverse to a public safety officer shall not be entered in the officer's personnel file "or any other file used for any personnel purposes" without the officer "having first read" the comment. The officer then has 30 days in which to file a written response to any adverse comment entered into the officer's personnel file. (Gov. Code, § 3306.) ***920**

For reasons that follow, we conclude the Department's internal affairs index card in Kime's name that lists all complaints made against him is a file "used for ... personnel purposes" within the meaning of the Public Safety Officers Procedural Bill of Rights Act. Therefore, if the internal affairs index card contains any comment adverse to Kime's interest with respect to the stolen car incident, he is entitled to read and respond to the adverse comment even though it did not result in any personnel action against him. Because the trial court ruled otherwise, we shall reverse the judgment denying Kime's petition for relief.

Factual and Procedural Background

During 1995, Kime was assigned to the Department's explosive ordinance detail, commonly referred to as the bomb squad. He was a supervisor and technician. As the supervising sergeant of the bomb squad, Kime was entitled to certain benefits, including an on-call pay differential, overtime pay during call-outs, and the use of a city take-home vehicle.

In late 1995, Kime's take-home vehicle was stolen from his possession. Hours later, it was recovered by the Department. Kime believes that his supervisor made a complaint charging Kime with neglect of duty. In any event, an investigation by the Department's internal affairs section was commenced. Pending the investigation, Kime was removed from his position with the bomb squad.

Kime commenced litigation over his removal from the bomb squad. (*Sacramento Police Officers Assn. v. Venegas* (Super. Ct. Sacramento County, 1996, No. 96CS00412).) It was resolved when the Department conceded that Kime was entitled to administrative review and agreed to return him to his position with the bomb squad. Ultimately, no adverse action was taken as the result of the internal affairs investigation.

The lawsuit now before us began when Kime filed a petition for a writ of mandate pursuant to the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3309.5), seeking access to, and an opportunity to review and rebut, any document in any file within the Department that contains comments adverse to his interests-specifically, any document relating to an allegation that Kime was neglectful in his duty with respect to the theft of his city-owned car.

In response to the petition, the Department asserted there are no records in Kime's personnel files concerning the stolen car incident, and said: "While Internal Affairs may have records relating to alleged misconduct, such ***921** allegations did not result in discipline nor are the Internal Affairs records a personnel record."

The Department explained that there are two levels at which disciplinary matters may be addressed. Investigations of misconduct of a minor nature-those which can result in informal disciplinary action-are handled at the "watch level." If informal action is taken, the information is retained at the watch level for one year, sent to and retained at the chief's office for one year, and then destroyed. Once destroyed, there is no record of informal discipline. Allegations of misconduct of a more serious nature are investigated by the internal affairs section of the Department. Information concerning such matters is not placed in an officer's personnel file unless disciplinary action is taken and the requirements of the Public Safety Officers Procedural Bill of Rights Act have been met.

A representative of the Department declared that an examination of Kime's personnel file kept in the personnel section, of pertinent watch level files, and of informal disciplinary records kept in the office of the chief of police revealed no entries or records, adverse or otherwise, with respect to the stolen car incident addressed in Kime's petition. However, the Department conceded that its internal affairs section has an index card that refers to the investigation of the theft of Kime's city-owned car.

The declaration stated that the Department investigates complaints against officers pursuant to Penal Code section 832.5 and, consistent with that statute, retains complaints for five years. All complaints made against an officer are logged in the internal affairs section on an index card kept in the officer's name. Unless disciplinary charges are sustained, such complaints are not used for evaluations, assignments, status changes, or to impose discipline, and they are kept confidential.

According to the declaration, the internal affairs index card in Kime's name reflects that an investigation was conducted about the theft of Kime's city-owned car, but that no adverse personnel action was taken against him.

The trial court denied the petition for a writ of mandate. The court reasoned that Kime had failed to establish a right to disclosure under the Public Safety Officers Procedural Bill of Rights Act because (1) he had not established that any adverse personnel action was taken against him, and (2) the Department had shown that internal affairs index cards are not used for evaluations, assignments, status changes, or to impose discipline. ***922**

Discussion

I

(1) Kime begins his argument with a discussion of Government Code section 3303, subdivision (g), a statute that we conclude is not applicable to this dispute. (Further section references are to the Government Code unless otherwise specified.)

Section 3303 establishes conditions for the interrogation of public safety officers who are under investigation that could lead to punitive action. Subdivision (g) of section 3303 provides: "The complete interrogation of a public safety officer may be recorded. If a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. *The public safety officer shall be entitled to a transcribed copy of any notes made by a stenographer or to any reports or complaints made by investigators or other persons, except those which are deemed by the investigating agency to be confidential.* No notes or reports that are deemed to be confidential may be entered in the officer's personnel file. The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation." (Stats. 1994, ch. 1259, § 1, pp. 7904-7905, italics added.)

In *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564 [273 Cal.Rptr. 584, 797 P.2d 608], the Supreme Court addressed whether a peace officer who was the subject of an internal police department investigation into suspected officer misconduct was entitled by section 3303 to review the reports and complaints before being interrogated about the allegations. (51 Cal.3d at pp. 568-569, 571.) The court held the statute does not compel preinterrogation discovery. (*Id.* at p. 579.) In addition to observing that the statutory language does not demonstrate an intent to grant the right to discovery of reports and complaints before an officer's interrogation (*id.* at pp. 576-577), the court noted that preinterrogation discovery is not fundamental to the fairness of an investigation and could frustrate the effectiveness of the interrogation. (*Id.* at pp. 578-579.)

Kime argues that, because the Department's internal affairs investigation of his alleged neglect of duty has ended, the purposes of confidentiality reflected in *Pasadena Police Officers Assn. v. City of Pasadena, supra,* 51 Cal.3d 564, no longer apply and, thus, section 3303, subdivision (g), requires the Department to produce the complaint and related documents. The Department retorts that section 3303, subdivision (g), gives the Department the ***923** absolute discretion to deem information to be confidential and that there is no limit to the duration of such confidentiality.

We conclude that section 3303, subdivision (g), is inapposite because it applies to the interrogation of a peace officer who is under investigation, whereas the investigation into Kime's alleged neglect of duty has ended and Kime concedes that he was never interrogated.

However, our conclusion that section 3303, subdivision (g), is inapplicable does not lend support to the position of either party. Because Kime is not under investigation, has not been and will not be interrogated, and no further proceedings are contemplated, section 3303, subdivision (g), does not give him a right to the discovery of materials he seeks. Consequently, it is irrelevant whether the termination of the investigation also terminated the need for confidentiality reflected in that subdivision. Likewise, the reference in section 3303, subdivision (g), to information "deemed by the investigating

agency to be confidential" does not help the Department. That subdivision does not give the Department an absolute right to deem any and all information confidential and to assert such confidentiality against any and all requests for access. It applies in the circumstances set forth in section 3303, i.e., with respect to the interrogation of a peace officer under investigation. Therefore, if Kime points to a specific statutory right of access to particular information, other than section 3303, subdivision (g), the Department cannot rely upon section 3303, subdivision (g), to deny access to the information.

II

(2) As recognized by both sides, the particular provisions of the Public Safety Officers Procedural Bill of Rights Act (hereafter the Bill of Rights Act) that apply here are sections 3305 and 3306.

Section 3305 provides: "No public safety officer shall have any comment adverse to his interest entered in his personnel file, or any other file used for any personnel purposes by his employer, without the public safety officer having first read and signed the instrument containing the adverse comment indicating he is aware of such comment, except that such entry may be made if after reading such instrument the public safety officer refuses to sign it. Should a public safety officer refuse to sign, that fact shall be noted on that document, and signed or initialed by such officer." (Stats. 1976, ch. 465, § 1, p. 1204.)

Section 3306 provides: "A public safety officer shall have 30 days within which to file a written response to any adverse comment entered in his ***924** personnel file. Such written response shall be attached to, and shall accompany, the adverse comment." (Stats. 1976, ch. 465, § 1, p. 1204.)

A

In construing these statutory provisions, we are guided by the recent decision of our Supreme Court in *County of Riverside v. Superior Court* (2002) 27 Cal.4th 793 [118 Cal.Rptr.2d 167, 42 P.3d 1034] (hereafter *County of Riverside*), published after the trial court ruled in this matter.

The issue addressed in *County of Riverside* arose after the City of Perris disbanded its police department, discharged its officers, and contracted with the county for law enforcement services. (*County of Riverside, supra,* 27 Cal.4th at p. 796.) To staff the new unit that would provide the services, the county sheriff's department hired, on a probationary basis, former City of Perris police officers, including Xavier Madrigal. Continuing employment was conditioned upon their successful completion of the background investigation applicable to new applicants for the position of deputy sheriff. (*Id.* at pp. 796-797.) Madrigal was discharged while still on probation. He suspected that he was dismissed because his background investigation revealed a complaint that he allegedly had engaged in illegal conduct while serving as a City of Perris police officer. (*Id.* at pp. 795, 797.)

Madrigal brought an action against the county, seeking, among other things, disclosure of the sheriff's background investigation file concerning Madrigal. (*County of Riverside, supra,* 27 Cal.4th at p. 797.) The parties agreed that if the investigation had been completed before Madrigal was hired, and if the investigation had caused the county not to hire him, he would have no right to view documents in the investigative file because there would have been "no employment relationship, no personnel file, and hence no question of the investigation file being subject to disclosure under the Bill of Rights Act." (*Id.* at p. 799.) It follows, the county argued, that because the conduct in question occurred prior to the commencement of Madrigal's employment with the county, the investigative file was not part of Madrigal's "personnel file" as that term is used in the Bill of Rights Act; hence, it was not subject to disclosure. (*Id.* at pp. 800-801.) The Supreme Court disagreed, stating: "The plain language of the Bill of Rights Act is inconsistent with the County's effort to distinguish its background investigation file in this way." (*Id.* at p. 801.)

Quoting with approval the decision in *Aguilar v. Johnson* (1988) 202 Cal.App.3d 241 [247 Cal.Rptr. 909] (hereafter *Aguilar*), the Supreme Court concluded that the language in the Bill of Rights Act should be construed ***925** broadly to include any document that " ' "may serve as a basis for affecting the status of [a peace officer's] employment," ' " regardless of whether it is kept separate from the officer's general personnel file. (*County of Riverside, supra,* 27 Cal.4th at p. 802.) Accordingly, the Supreme Court "reject[ed] the assertion that a law enforcement agency's background investigation of a peace officer during probationary employment is somehow not a personnel matter subject to the Bill of Rights Act." (*Ibid.*) "The label placed on the investigation file is irrelevant. The materials in the file unquestionably ' "may serve as a basis for

affecting the status of the employee's employment" ' [citing *Aguilar, supra,* 202 Cal.App.3d at p. 251]; indeed, that is the very purpose of the background investigation." (*County of Riverside, supra,* 27 Cal.4th at p. 802.) The court went on to say its conclusion that the Bill of Rights Act applies was "valid even where the background investigation concerns a matter that occurred prior to the commencement of employment." (*Ibid.*) Moreover, where "the adverse comments arise out of an investigation, the very purpose of which was to assess the employee's qualifications for continued employment, ... the Bill of Rights Act applies, whether or not the comments are prepared and filed prior to termination." (*Id.* at p. 803.) [FN1]

> FN1 The Supreme Court expressed no opinion whether a background investigation file compiled prior to an offer of employment would become a file used for personnel purposes once the applicant is hired. (*County of Riverside, supra,* 27 Cal.4th at p. 802.) Although the court proceeded to address whether an employee may waive the protections of the Bill of Rights Act, that issue does not arise in this case.

B

Consistent with the decision in *County of Riverside, supra,* 27 Cal.4th 793, we must give appropriate consideration to the fact that the Legislature utilized broad language in enacting sections 3305 and 3306. The events that will trigger an officer's rights under those statutes are not limited to formal disciplinary actions, such as the issuance of letters of reproval or admonishment or specific findings of misconduct. Rather, an officer's rights are triggered by the entry of any adverse comment in a personnel file or any other file used for a personnel purpose. (See *County of Riverside, supra,* 27 Cal.4th at pp. 802, 803.)

Aguilar, supra, 202 Cal.App.3d 241, addressed the meaning of an adverse comment for the purposes of sections 3305 and 3306 of the Bill of Rights Act. It noted: "Webster defines comment as 'an observation or remark expressing an opinion or attitude....' (Webster's Third New Internat. Dict. (1981) p. 456.) 'Adverse' is defined as 'in opposition to one's interest: Detrimental, Unfavorable.' (*Id.* at p. 31.)" (*Aguilar, supra,* 202 Cal.App.3d at p. 249.) Thus, for example, under the ordinary meaning of the ***926** statutory language, a citizen's complaint of brutality is an adverse comment even though it was "uninvestigated" and the chief of police asserted that it would not be considered when personnel decisions are made. (*Id.* at pp. 249-250.)

We find the reasoning in *Aguilar* to be persuasive, as did the Supreme Court in *County of Riverside, supra,* 27 Cal.4th 793. In its usual and ordinary import, the broad language employed by the Legislature in sections 3305 and 3306 does not limit their reach to comments that have resulted in, or will result in, punitive action against an officer. The Legislature appears to have been concerned with the potential unfairness that may result from an adverse comment that is not accompanied by punitive action and, thus, will escape the procedural protections available during administrative review of a punitive action. As we will explain, even though an adverse comment does not directly result in punitive action, it has the potential of creating an adverse impression that could influence future personnel decisions concerning an officer, including decisions that do not constitute discipline or punitive action. (See *Caloca v. County of San Diego* (1999) 72 Cal.App.4th 1209, 1222 [85 Cal.Rptr.2d 660].) The legislative remedy was to ensure that an officer is made aware of adverse comments and is given an opportunity to file a written response, should he or she choose to do so.

Accordingly, we reject the Department's claim that Kime had no right to review any adverse comment about the stolen police car incident because the information did not result in any adverse personnel action. To the contrary, we conclude that, regardless of whether the employing agency contemplates or has rejected further action regarding an adverse comment made against a peace officer employee, the officer is entitled to disclosure of the comment if it is entered in an agency file used for a personnel purpose. Our conclusion is consistent with the reasoning of *County of Riverside, supra,* 27 Cal.4th 793, which implies that an adverse comment contained in a background investigation file is subject to disclosure even if the officer does not suffer some sort of adverse consequence, as long as it has that potential. (*Id.* at p. 802 [the Bill of Rights Act applies to any comment that *may* serve as a basis for adversely affecting the status of the peace officer's employment].) [FN2]

> FN2 In any event, the Department in fact removed Kime from his position with the bomb squad pending the Department's internal affairs investigation. Although it reversed itself and returned Kime to his position when he commenced litigation, it is

too late for the Department to maintain that the adverse comment in dispute could have no effect on Kime's existing employment status. The comment could affect his employment status because it already has done so, at least temporarily.

C

(3) Nevertheless, the Department argues that it is not required to disclose adverse comments in records kept by its internal affairs section ***927** because such records are not personnel files and are not used for any personnel purposes by the Department. The argument is unpersuasive.

First, the Department's contention is belied by the fact that it handles all complaints about its peace officer employees pursuant to the provisions of Penal Code section 832.5 et seq., which require, among other things, that (1) "[e]ach department or agency in this state that employs peace officers shall establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public" (Pen. Code, § 832.5, subd. (a)), and (2) "[c]omplaints and any reports or findings relating to these complaints shall be retained for a period of at least five years" (Pen. Code, § 832.5, subd. (b)).

While this statutory scheme addresses "complaints by members of the public" (Pen. Code, § 832.5, subd. (a)), the Department applies the scheme without distinguishing between complaints by the public and complaints by fellow peace officers. [FN3]

FN3 Nothing in the statutory scheme either requires or precludes a law enforcement agency from treating a complaint by a peace officer in the same manner as a complaint by a member of the public for purposes of Penal Code section 832.5. We consider the Penal Code provisions here because the Department, by declaration, states that it treats peace officer complaints the same as citizen complaints pursuant to those provisions.

The scheme implicitly encompasses three broad categories of complaints, based upon their disposition: (1) complaints upon which disciplinary action is proposed and to which normal administrative procedures are applicable-the Department refers to this type of complaint as "founded"; (2) complaints that are affirmatively disproved, which are referred to in the statute as "frivolous, unfounded, or exonerated;" [FN4] and (3) complaints that are not affirmatively disproved but are regarded as not established sufficiently to support disciplinary action-the Department refers to this type of complaint as "not sustained."

FN4 For this purpose, "frivolous" is given the meaning set forth in Code of Civil Procedure section 128.5, which permits a trial court to impose sanctions on a party or attorney. (Pen. Code, § 832.5, subd. (c).) Thus, a "frivolous" complaint is one that is "totally and completely without merit" or is taken "for the sole purpose of harassing [the peace officer]." (Code Civ. Proc., § 128.5, subd. (b)(2).) A complaint is "unfounded" when the investigation has "clearly established that the allegation is not true" (Pen. Code, § 832.5, subd. (d)(2)), and a complaint is "exonerated" when the investigation has "clearly established that the actions of the peace officer that formed the basis for the complaint are not violations of law or department policy." (Pen. Code, § 832.5, subd. (d)(3).)

Complaints against a peace officer that are frivolous, unfounded, or exonerated "shall not be maintained in that officer's general personnel file" ***928** and, instead, "shall be retained in other, separate files *that shall be deemed personnel records* for purposes of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) and Section 1043 of the Evidence Code [discovery or disclosure of peace officer personnel records or records maintained pursuant to Penal Code section 832.5, or information from those records]." (Pen. Code, § 832.5, subds. (b) & (c), italics added.) Penal Code section 832.5 is silent as to whether complaints that are "not sustained" may be maintained in an officer's general personnel file. However, the Department has declared it treats all complaints that do not form the basis for disciplinary action the same by maintaining them only on internal affairs index cards.

Because a peace officer's adverse comment against another peace officer is documented on the same internal affairs index card that contains citizen complaints, the Department has chosen to keep the complaints in a "file," so to speak, statutorily defined

to be a personnel record for purposes of disclosure.

In any event, a comment alleging misconduct by a peace officer " ' "may serve as a basis for affecting the status of the [officer's] employment " ' " (*County of Riverside, supra,* 27 Cal.4th at p. 802) regardless of whether the adverse comment was made by a citizen or by another peace officer. Just as a police agency's background investigation of a peace officer during probationary employment is a personnel matter subject to the Bill of Rights Act (*ibid.*), so, too, must be the agency's internal affairs investigation of an adverse comment against one of its peace officer employees.

Indeed, the function of a police agency's internal affairs section is to "police the police" by investigating complaints and incidents to determine an officer's fitness to continue to serve, and whether disciplinary or other corrective action is required. By any definition, that is a personnel purpose. Hence, an internal affairs file or index card necessarily is a "file used for any personnel purposes" within the meaning of section 3305 of the Bill of Rights Act. As the Supreme Court said in *County of Riverside, supra,* 27 Cal.4th 793: "Where ... the adverse comments arise out of an investigation, the very purpose of which was to assess the employee's qualifications for continued employment, ... the Bill of Rights Act applies" (*id.* at p. 803), and the law does not permit a law enforcement agency to shield such a comment from a peace officer employee by purporting to segregate it from other personnel files. (*Id.* at p. 805.)

The purposes of sections 3305 and 3306 readily apply to an adverse comment on Kime's internal affairs index card. The Department conceded at ***929** oral argument that if, in the future, a complaint is made against Kime and the internal affairs investigator reads Kime's index card, an unexplained and unrebutted charge of neglect of duty could color the investigator's view of Kime and affect the investigation of the new complaint. This is the type of comment adverse to his interest that the Bill of Rights Act gives Kime the opportunity to review and explain or rebut if he can.

According to the Department, disclosure is not required here because, under its procedures, no one has access to the internal affairs files except internal affairs personnel. Not so. Penal Code section 832.5, subdivision (c)(1), provides that "[m]anagement of the peace officer's employing agency shall have access to the files described in this subdivision," pursuant to which the Department maintains its internal affairs index cards. Although complaints that are determined to be frivolous, unfounded, or exonerated may not be used for punitive or promotional purposes unless the investigation is reopened for sufficient cause, they *can* be used to require counseling or additional training. (Pen. Code, § 832.5, subd. (c)(2) & (3); Gov. Code, § 3304, subd. (g).) Moreover, as we have observed and the Department has conceded, internal affairs personnel could be influenced to a peace officer employee's detriment in a future investigation if the officer's internal affairs file or index card contains an unexplained or unrebutted adverse comment.

Lastly, the Department protests that allowing a peace officer employee to discover and respond to adverse comments entered on the employee's internal affairs index card undermines public policy. In its words: "People who have complaints against police officers should be encouraged to come forward.... In some cases, these individuals may only be willing to come forward confidentially. Officers must be free to report misconduct without fear of reprisal or fear of being ostracized. It is common knowledge that officers who report misconduct by other officers can be labeled as 'snitches.' The 'Code of Silence' still exists in some police circles today.... Public policy does not support requiring disclosure of investigations and/or complaints which do not result in any disciplinary or other personnel action."

However, the Department ignores the countervailing public policy articulated by the Legislature when it found and declared that "the rights and protections provided to peace officers under [the Bill of Rights Act] constitute a matter of statewide concern.... [E]ffective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this ***930** chapter be applicable to all public safety officers ... wherever situated within the State of California." (§ 3301.)

It is true that some persons might be dissuaded from reporting peace officer misconduct if they cannot do so confidentially. On the other hand, it is equally true that some might view a shield of confidentiality as a license to make false allegations of police misconduct. Moreover, it takes no imagination to recognize that a shield of confidentiality would make

it difficult for an accused peace officer to respond to and rebut a false claim of misconduct and could lead to serious employee discontent. The Legislature has resolved these policy conflicts in favor of peace officer employees.

For all the reasons stated above, we reiterate that the Bill of Rights Act applies to any adverse comment entered on Kime's internal affairs index card.

III

(4) Despite the foregoing conclusion, the rights accorded to Kime by sections 3305 and 3306 are not as broad as the relief he seeks, i.e., an order commanding the Department to provide him with access to, and the opportunity to review and comment upon, any documents relating to the investigation concerning an allegation that Kime was negligent on duty with respect to the theft of the city-owned car entrusted to him.

As we have explained, the Bill of Rights Act entitles Kime to discover and respond to any *adverse comment* about him entered on his internal affairs index card. But he does not have the right of access to information on the index card that does not constitute an adverse comment, i.e., he is not entitled to the entirety of the Department's investigative record.

Although Kime seeks overbroad relief, he has established a prima facie case for issuance of a writ of mandate pursuant to the Bill of Rights Act by alleging that the Department maintains a file under his name, containing a charge made by a superior officer that Kime was guilty of neglect of duty with respect to the theft of Kime's city-owned car. In response, the Department has not denied that an internal affairs index card in Kime's name contains such an allegation. The Department's response does not specifically admit that Kime's internal affairs file contains an adverse comment; it simply states that the file reflects there was an investigation into the theft of Kime's police car. Of course, the Department cannot be compelled to disclose what it does not have. But it may be required to answer affirmatively whether the file contains an adverse comment and, if so, to permit Kime to discover and respond to the adverse comment. ***931**

Consequently, we will reverse the judgment and remand the matter for further proceedings to issue an appropriate writ of mandate.

Disposition

The judgment is reversed, and the matter is remanded to the trial court for further proceedings consistent with the views expressed in this opinion. Plaintiffs shall recover their costs on appeal. (Cal. Rules of Court, rule 26(a).)

Raye, J., and Kolkey, J., concurred. ***932**

Cal.App.3.Dist.,2002.

SACRAMENTO POLICE OFFICERS ASSOCIATION et al., Plaintiffs and Appellants, v. ARTURO VENEGAS, JR., as Chief of Police, etc., et al., Defendants and Respondents.

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